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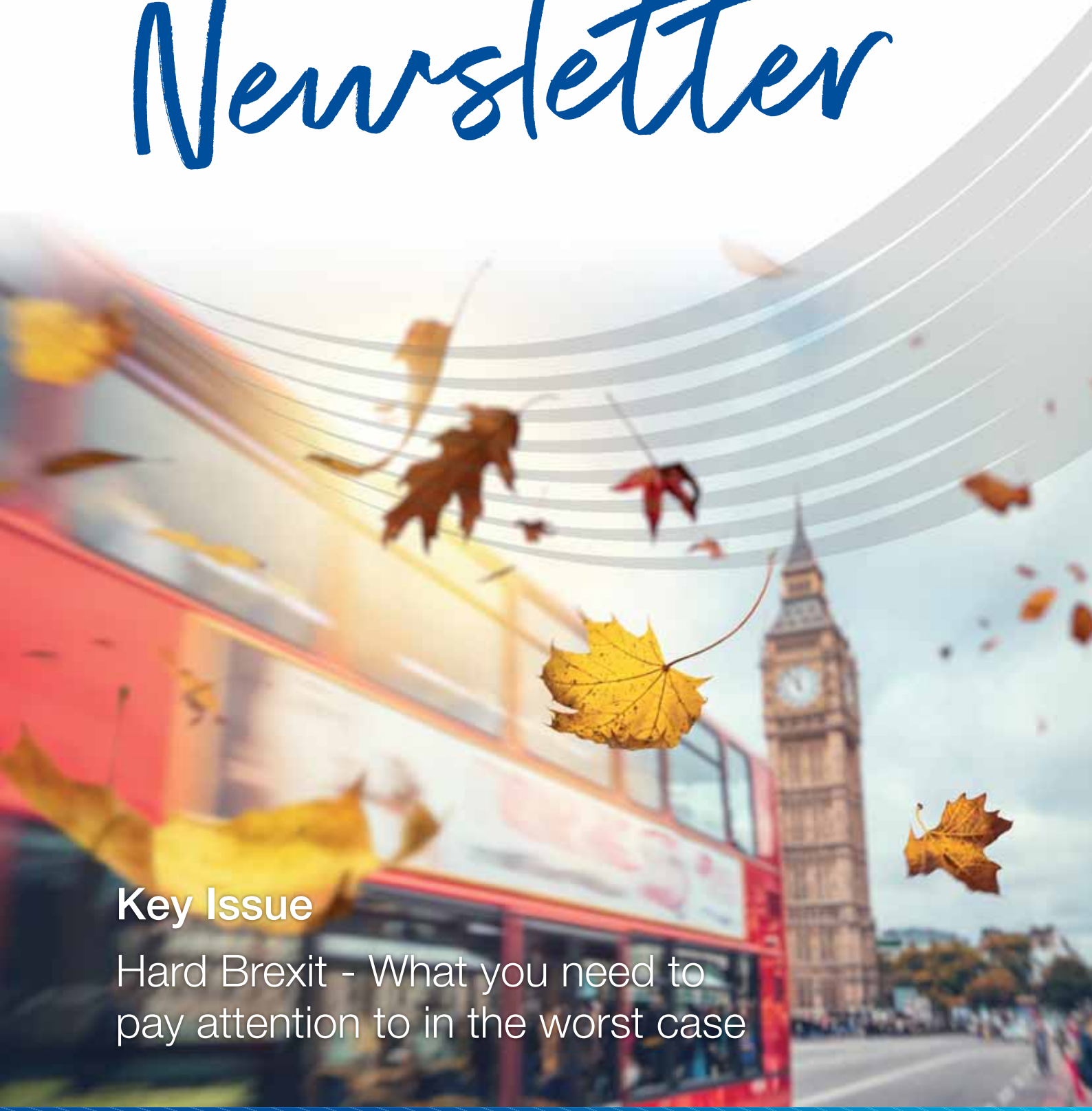
Newsletter



Key Issue

Hard Brexit - What you need to pay attention to in the worst case

10|19

Dear Readers,

By the time this October issue went to press it was not yet clear whether Brexit would now happen at the end of this month or whether it would be delayed once again. Furthermore, it is still open whether, in the event of Brexit, the agreement that was negotiated with the EU last spring – possibly with some last minute changes – will be signed, or whether there will be a disorderly no-deal Brexit. In the Key Issue for this edition **we have assumed the worst case and have highlighted what you need to pay attention to in the short term** as regards **Brexit**. Although, very far reaching consequences and a corresponding **need for action** will arise in the event of a Brexit with a deal, too. For instance, many great and small simplifications in the area of customs and VAT, which have been worked out in the EU over the years, would cease to apply. The example that is given in this respect is the discontinuation of the so-called MOSS scheme; under this, usually smaller companies have been able to register, centrally in Berlin, and pay the foreign VAT on services supplied electronically to private individuals. As soon as the UK becomes a third country this possibility will be eliminated. This may give an impression of the highly practice-relevant changes to service and supply relationships that will ensue with the UK as a third country.

The second report differentiates between the conditions under which **managing directors and board members** are also able to benefit from **working time accounts** for an early or a flexible transition to retirement; although, here the fiscal authority has abandoned an overly tough approach only on account of court rulings. In the next article after that, in the Tax section, we have compiled for you the planned amendments to the **tax incentive scheme for research and development**, which would apply from 2020. The last article in the Tax section deals with the requirements in a new Federal Ministry of Finance circular where the reins for **the electronic record-keeping of cash transactions** have been tightened further. As even from a technical point of view it will scarcely be possible to implement these requirements by the end of the year, we will have to wait and see if, once again, the courts will be asked to rein in an overambitious fiscal authority.

In the Legal section, first of all there is an overview of the specifics provided by the Federal Labour Court in relation to the ECJ judgement on the **(non-)forfeitability of leave**. As already discussed in our January issue of the newsletter, there are very narrow limits within which leave can expire. In our second contribution we provide you with an introduction to the eventful legal history of pension beneficiaries who get married late in life. In the course of this, it is indeed possible to see that there has been a balancing act between discrimination and financial burdens.

In the Accounting & Finance section, we have a report on amendments that aim to clarify the rules on **foreign currency translation**.

We wish you an interesting read.

Your Team at PKF

Key Issue

Hard Brexit – What you need to pay attention to in the worst case

Contents

TAX

WP/StB [German public auditor/ tax consultant] Daniel Scheffbuch

Hard Brexit – What you need to pay attention to in the worst case

On 6.9.2019, the UK's lower house of Parliament passed a law aimed at preventing a no-deal Brexit on 31.10.2019. Under this Act, if the Prime Minister has not secured an agreement with the EU by 19.10.2019 then he must request a delay to Brexit until 31.1.2020. As it is currently not foreseeable what such an agreement would look like, in particular as regards the EU border between Ireland and Northern Ireland, – and as the Prime Minister is insisting that he will refuse to seek an extension to the Brexit deadline despite the UK Act – no-deal still constitutes the worst case. In the following section we present the most important consequences that could result in the case of a no-deal Brexit and, to a large extent, in all other forms of Brexit, too.

1. If the UK becomes a third country ...

The UK will leave the EU on 31.10.2019, or at the very latest on 31.1.2020. The UK is comprised of England, Northern Ireland, Scotland and Wales. In the worst case, the UK would not be part of the European Economic Area (EEA, of which Norway, Iceland and Liechtenstein are also members in addition to the EU countries) and would then also not have any bilateral treaties and preferential agreements with the EU, like Switzerland, for example. In such a worst case scenario there would be no so-called backstop – this is an agreement under which, temporarily, until a free trade agreement has been negotiated, the UK would still remain in a customs union with the EU and,

in addition, Northern Ireland would also stay in the European single market in order to avoid checks along the border between Ireland and Northern Ireland.

From the perspective of Germany, Ireland and the other EU members, after Brexit the UK would become a third country. World Trade Organisation (WTO) rules would apply to customs and trade where appropriate.

2. ... the following hot issues will arise

When Brexit happens, regardless of whether or not there is an agreement, companies will have to give their attention to the following topics in particular:

- taxes,
- movement of goods and customs,
- supply chains,
- access to markets,
- processes/IT/CMS,
- accounting & reporting,
- currency & treasury,
- law & contracts,
- personnel and
- transactions & restructuring.

In the following section, we take a closer look at some aspects that, in the worst case, could very quickly become hot issues for many companies.

3. Adjustment of processes/IT/CMS

Companies will have to adapt their internal processes to take account of the UK's new status. This will apply especially to the following points:

- Adjustments to master data (e.g. control indicators)
- Changes to the ERP system
- Information/texts shown on invoices (VAT number, references to VAT rules)
- Review of Incoterms – who is doing the importing?
- Information and staff training
- The General Data Protection Regulation (GDPR) would no longer be applicable.

4. The impact on the movement of goods and on customs

As the UK will no longer be part of the EU Customs Union the checks at the border will have to be stabilised. Border checks at the port cities of Dover (England) and Calais (France) would be particularly critical. According to information provided by the French port, more than 40 million tonnes of goods and two million lorries cross the Strait of Dover every year.

In the worst case, if there is no customs union, goods from the UK going to the EU, and vice versa, would have to complete customs import and export formalities. Having an external EU border at the port of Calais would mean that every container and each lorry from and to the UK would require customs documents. There is a risk of checks, supply shortages and long queues.

The German Central Customs Authority has set up, among other things, "Brexit pools" in order to be able to respond sufficiently flexibly to the quantitative and localised impacts of Brexit. To this end, for all of Germany eight regions have been established where the main customs offices will use the ATLAS IT system – the customs administration's automated clearance system – to provide each other with mutual support in clearance procedures. However, the challenges that Brexit poses cannot be met by the customs administration alone. Businesses that are affected will likewise have to prepare themselves for Brexit, too.

Customs declarations that are required for cross-border goods traffic will have to be monitored with respect to all prohibitions and restrictions as well as export controls, in particular in terms of:

- labelling requirements as well as the provision of approval documents and accompanying documents (e.g. export licences, pharmaceutical licences, ...),
- rules for the forwarding agent (international driving licence, other permit),
- the problem that goods with UK originating materials could lose their EU originating status,
- review of authorisations and with respect to
- potential trade restrictions.

In the case of deliveries to the UK, in the future, the necessary customs declaration will have to be submitted via the ATLAS (automated tariff and local customs clearance) IT system.

5. Changes to VAT on the delivery of goods ...

EU VAT legislation (EU Directive on the VAT system and ECJ case law) will potentially no longer be applicable in the UK. There will not be many substantive changes in the case of B2B goods deliveries. Tax-exempt intra-Community (IC) deliveries will become tax-exempt exports to the UK, while IC purchases will become imports into the EU. Nevertheless, there will be a considerable increase in the effort and costs needed for clearance and documentation. The UK is currently working on rules that, under certain circumstances, would simplify import clearance; developments here should be monitored and, where appropriate, the terms of delivery should be adjusted.

Specifically, you should pay attention to the following (cf. also our previous report in issue 03/19).

Chain transactions – In the case of transactions with an intermediary in the EU and an end buyer in the UK you need to take account of a particularity, namely, that exporters liable to VAT may differ from those deemed to be exporters for customs purposes. In the view of the German customs administration, the exporter for customs purposes is always the EU intermediary even if, for VAT purposes, the movement of goods for the delivery of the German business has to be attributed to the EU intermediary.

Transporting to warehouses – Transporting to the UK as a third country will always constitute an export with the subsequent supply being taxable under UK law. A tax-exempt supply to the (end) buyer would no longer be feasible.

Changes for B2C – Currently, mail-order deliveries to the UK up to a limit of GBP 70,000 can be taxed in Germany. It is only once this threshold of sales has been breached that the place of supply shifts to the UK (Section 3c of the German VAT Act *(Umsatzsteuergesetz, UStG)*). In the event of Brexit this simplification will cease to apply. The German mail-order company would then make a tax-exempt export delivery. Instead, British import sales tax (IST) would potentially arise on an import into the UK because the place of supply would have shifted to the UK. For suppliers this would imply a change to a process and would involve considerable additional costs as a result of having to submit customs declarations, having to register in the UK and pay IST and UK VAT. German VAT will continue to apply if the buyer provides the transport – however, under certain circumstances, a German supplier will not wish to inflict the obligations associated with this on to its British customer.

Checking paperwork – Documents generally used as proof should be checked with respect to the wording and clauses that have been used, in particular, as to whether or not they can be kept as proof of export. For example, German suppliers that use a forwarding agent's certificate as proof of a tax-exempt delivery should ensure that the export case is covered.

Input tax – As regards refunds of British VAT, refund applications in respect of the UK should be filed via the electronic portal at the German Federal Central Tax Office *(Bundeszentralamt für Steuern, BZSt)* up to the exit date.

6. ... and on the supply of services

(1) In the case of B2B services, the place of supply will also generally still be the place where the recipient is domiciled (Section 3a(2) UStG). Up to now, it has remained open as to whether the recipient would be liable for VAT under UK law, or whether the supplying German business entity would have to register in the UK and invoice at the local VAT rate. The mandatory application of the reverse charge mechanism under the EU Directive on the VAT system would however no longer apply. Moreover, British VATINs and the proof of commercial status that they provide would likewise no longer apply. In the future, German business entities would have to check the commercial status in another way (e.g. via the registration as a business entity liable to pay VAT) if they wished to avoid the risk of taxation in Germany.

(2) In the case of B2C services, the place of supply will generally remain the place where the supplying business entity is domiciled (Section 3a(1) UStG), even if the UK becomes a third country. In the case of certain services (data processing, supplying information, consulting, etc.) the place of supply would be the domicile of the private individual (Section 3a(4) UStG) because the UK will have become a third country.

Please note: It should be noted that the MOSS scheme (Mini One Stop Shop) for services supplied electronically to private individuals in the UK will no longer be applicable. MOSS is a simplification procedure under which VAT no longer has to be paid in each individual EU country but instead centrally, on a quarterly basis, to the German Federal Central Tax Office (BZSt). The MOSS scheme would have been applicable to mail order as well from 2021.

7. Implications for tax on earnings

Important EU directives, such as the Parent-Subsidiary Directive, Interest-Royalties Directive, Merger Directive and the ATAD (Anti Tax Avoidance Directive) would no longer be in force in the UK after Brexit. If no other arrangements are made then matters relating to tax on earnings between business entities in the UK and Germany will be regulated through the double taxation agreements (DTA) between the UK and Germany.

In the event of Brexit, the dividends paid by a German business entity to a UK company (in the absence of the Parent-Subsidiary Directive) would be subject to a withholding tax reduction to 5% (Art. 10(2)a) of the UK DTA with Germany).

By contrast, if a domestic (German) parent company received dividends from a UK subsidiary then, under the UK DTA with Germany, the UK could withhold tax of 5%. Based on the current legal status, the UK does not impose any withholding tax on dividends.

Brexit will not affect the taxation of interest and royalties because the DTA does not provide for any withholding tax on interest and royalty payments (Art. 11(1) and Art. 12(1) of the UK DTA with Germany).

Under the German External Tax Relations Act (Außensteuerrecht, AStG) it would no longer be possible to provide proof of assets or evidence of actual commercial activity in order to avoid taxation of CFC income despite passive income pursuant to Section 8(2) AStG. Therefore, in the case of passive income, the taxation of CFC income will be of greater relevance.

Please note:

We will keep you informed about the latest developments in the Brexit process. As soon as there is a definite date for Brexit we will invite you to a webinar.

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

Working time account models for the organs of corporations – New recognition guidelines from the Federal Ministry of Finance

Up to now, the fiscal authority has not recognised, for payroll tax purposes, agreements on time accounts for employees who have also been appointed as an organ (e.g. managing directors of a GmbH (private limited company), the executive board of an AG (a joint stock company)). After a landmark ruling of the Federal Fiscal Court *(Bundesfinanzhof, BFH)*, the Federal Ministry of Finance *(Bundesministerium der Finanzen, BMF)* made revisions to its guidelines in a circular from 8.8.2019.

1. The previous view of the fiscal authority

Working time accounts constitute a model for the flexibilisation of working hours. Employers and employees agree that the remuneration of the employee concerned will not be paid out immediately and in full but, instead, the amount will be recorded in a working time account in order to pay it out to him or her in the context of a future leave of absence. In the view expressed hitherto by the fiscal authority (cf. BMF circular from 17.6.2009),

crediting the working time account does not yet result in an inflow of remuneration. It is only when the credited amount is paid out during a leave of absence – therefore, the point in time when the employee acquires economic authority to dispose of his/her salary – that there is an inflow and the corresponding payroll taxation takes place.

However, up to now, organs of corporations were explicitly excluded from this regulation because it was the opinion of the fiscal authority that agreements on the creation of working time accounts were not compatible with the duties of an organ of a corporation. Consequently, in the case of all managing directors and executive board members, crediting remuneration to a working time account resulted in an immediate inflow of remuneration.

2. A new BFH ruling

The BFH, in its ruling from 22.2.2018, distanced itself from this restrictive interpretation of the fiscal authority, at least with respect to working time accounts for external organs, i.e. those who are not concurrently shareholders. In the opinion of the Munich judges, there is no legal basis why for the inflow of remuneration other requirements should apply to external organs than do for other employees. This is because even if you follow the view of the fiscal authority such that agreements for working time accounts are not compatible with the duties of an organ of a corporation, nevertheless, the inflow and obtaining economic authority to dispose will be determined by actual circumstances. Yet, the external organ will only acquire the economic authority to dispose once the funds have been paid out.

3. BMF circular from 8.8.2019

Against the background of the above-mentioned ruling, the BMF adjusted its guidelines with respect to working time accounts for organs of corporations, in its circular from 8.8.2019, as follows:

(1) Organs with no shareholders – Agreements on the creation of working time accounts also have to be recognised in the case of organs of a corporation.

(2) Minority shareholder organs – A review should be carried out on the basis of general principles in order to determine whether or not a hidden profit distribution has been made. If the model has been configured on the basis of an arm's length arrangement then the working time accounts have to be recognised for payroll tax purposes.

(3) Majority shareholder organs – There will always be a hidden profit distribution. Consequently, agreements on the creation of working time accounts may not be recognised for payroll tax purposes.

StB [German tax consultant] Dennis Brügge

Tax incentive scheme for research and development

The German Federal Cabinet has adopted a draft law on the introduction of a tax incentive scheme for research and development (R&D). There are plans to pass the law before the end of this year so that the provisions can come into force from 2020. The aim of the following report is to give an overview of the planned new regulations.

1. Incentive in the form of a tax allowance model

The draft law in question provides for incentives granted in the form of a tax allowance oriented towards the remuneration paid out in the R&D division. A supplementary tax law will govern the general conditions here. The research allowance will be paid out in a tax-neutral way – it would not be included under taxable income and nor would it reduce the personnel costs that would be deductible as business expenses either.

All taxpayers with profit income will generally be able to apply for the allowance. Eligibility for the allowance will not be limited on the basis of the size of the entity nor the type of activity carried out within the enterprise. Consequently, companies of all sizes will have access to grants.

2. Definition of tax-privileged activities

The grants will be restricted to activities in the field of basic research, applied research and experimental development. It will generally be possible to determine tax-privileged activities on the basis of the following criteria.

The R&D project will have to:

- be aimed at acquiring new knowledge (innovative),
- be based on original, non-obvious concepts and hypotheses (creative),

- be indeterminate in terms of the end result (indeterminate),
- follow a plan and be budgeted (systematic), and
- lead to results that will be able to be reproduced (transferable and/or reproducible).

Other eligibility criteria for individual categories have been included in the draft law in the appendix to Section 2 of the Research Allowance Act (Forschungszulagengesetz-Entwurf, FZulG-E) (see Bundesrat document 242/19).

Please note: Activities intended to further develop an existing product or a method that essentially already exists would however not fall under tax-privileged activities.

3. Assessment base and amount of tax allowance

The starting point would be the sum calculated for personnel expenses that are subject to payroll tax and eligible for a tax allowance in the R&D division for the respective financial year. The maximum amount of expenses eligible for a tax allowance will be limited to € 2,000,000 in the financial year per each eligible enterprise. The draft law provides for a research allowance in the amount of 25% of the assessment base. Therefore, the maximum research allowance that could be determined would, at most, amount to € 500,000 in the financial year for an eligible enterprise. Affiliated companies will be able to make use of the assessment base only once.

4. Application procedure

The tax allowance will be granted upon application. The basis for the grant will be the existence of one or more tax-privileged projects. The verification check to ensure that the R&D project is eligible for a grant will remain the responsibility of an appropriate agency outside of the fiscal authority that will bindingly determine the necessary requirements for the processing of applications.

Recommendation

The current draft law on tax incentives for R&D is a first step towards research tax incentives in Germany. While the draft law still leaves numerous questions unanswered, nevertheless, it is important for Germany as a business and research location that such arrangements have got off the ground in the first place. Before the legislative procedure is completed – which should still be this year – there will undoubtedly still be some discussion and also one or more adjustments made to the legal text.

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

New Federal Ministry of Finance circular on the obligation to keep records and maintain a cash register

The German Act for the Protection Against Manipulation of Digital Basic Records, from 22.12.2016, (the so-called "2016 Cash Register Act") led to the creation of Section 146a of the Fiscal Code *(Abgabenordnung, AO)* – a regulatory provision for accounting and record-keeping using electronic record-keeping systems. In the meantime, on 17.6.2019, the Federal Ministry of Finance *(Bundesministerium der Finanzen, BMF)* published an application decree for Section 146a AO where the requirements together with the Cash Register Anti-Tampering Ordinance *(Kassensicherungsverordnung, KassenSichV),* from 26.9.2017, have been clearly specified.

1. The stipulations under Section 146a AO

Section 146a AO regulates, in particular, the requirements relating to electronic record-keeping systems. The intention and the purpose of the norm are to minimise the risk of tampering with electronic record-keeping systems. Therefore, from 1.1.2020, all taxpayers that generally record business transactions or other events via such electronic record-keeping systems will have to use a system that logs every situation that has to be recorded separately, completely, correctly, in a timely and in an orderly manner. In the process, all electronic record-keeping systems and digital records will have to be protected against tampering by means of a technical security system (so-called TSS). The TSS will have to consist of a security module, a storage medium and a standardised digital interface and be certified by the Federal Office for Information Security *(Bundesamt für Sicherheit in der Informationstechnik, BSI).* Furthermore, Section 146a AO basically also includes an obligation for the taxpayer to issue a receipt as well as a disclosure requirement.

2. Application decree for Section 146a AO

The circular contains, in particular, general definitions of terms, the substantive and temporal scope of application, requirements relating to the TSS, explanatory notes about the obligation to issue receipts and the disclosure requirement as well as statements about the legal consequences of a breach of Section 146a AO. The following aspects are of particular importance.

(1) Definition of an electronic record-keeping system – Electronic record-keeping systems, which have to have a TSS, specifically include electronic or computer-based cash register systems or cash registers within the meaning of Section 1 KassenSichV and tablet-based cash register systems or software solutions.

(2) Obligation to issue receipts – Taxpayers have to make receipts available to their customers in electronic or paper form, within the meaning of Section 6 KassenSichV, immediately after a transaction has occurred. The requirements for receipts and the issue of receipts have now been specified.

(3) Disclosure requirement from 1.1.2020 – Every taxpayer that uses electronic record-keeping systems has to report this to the competent tax office, using an officially prescribed form, within a month of acquiring such a system or removing it from service. Mandatory reporting of all cash registers acquired prior to 1.1.2020 will thus have to be completed by 31.1.2020.

(4) Legal consequences – Compliance with Section 146a AO cannot be enforced through an administrative act or compulsory measures, however, non-compliance with the obligation to issue receipts and the disclosure requirement could entail sanctions.

3. Outlook

There is now only still a little more than two months time left to retrofit the more than two million cash register systems concerned in Germany. However, there are currently still no cash register systems available on the market that have been certified by the BSI. Should a certified system still become available on the market in the next few months it is likely that there would be extreme supply bottlenecks.

It is thus highly doubtful that the retrofitting could be carried out in good time. Therefore, in order not to blame taxpayers for a situation over which they have no control, it is hoped that the BMF will respond and extend the deadline for retrofitting.

RAin [German lawyer] Sonja Blümel

No accrual of leave entitlements

Since the judgements of the European Court of Justice (ECJ) on the transferability and expiry of leave entitlements, new obligations have arisen for employers if leave that has not been taken by the end of a holiday year or carry-over period is supposed to expire with no compensation. The Federal Labour Court *(Bundesarbeitsgericht, BAG),* in several rulings, has now set out these obligations in detail.

1. Previous legal situation

Prior to the more recent ECJ judgements on the statutory minimum leave, the following used to apply. The statutory minimum leave generally had to be applied for and taken in the current holiday year otherwise the entitlement would expire with no compensation. In exceptional cases, it was possible to carry over leave until 31.3 of the subsequent year (e.g. if it had not been possible to grant leave for operational reasons). After the end of the carry-over period, at the very latest, entitlement to leave that had not been taken expired. Therefore, if employees failed to apply for their leave in the first place then this was to their disadvantage and their leave expired.

2. New legal situation according to the ECJ and the clarifications by the BAG

The ECJ decided that statutory minimum leave and the corresponding granting of paid leave do not automatically expire (e.g. at the end of the holiday year) even if the employee has failed to apply for leave in good time (cf. ECJ, judgement from 6.11.2018, C-684/16 [Max Planck Society for the Advancement of Science] “Shimizu“; judgement from 29.11.2017, C-214/16”King“). There was a detailed report about this issue in the PKF Newsletter 1/2019.

After the ECJ ruling, it was still unclear when and under what conditions leave could indeed expire after all. The BAG has ruled on this issue (cf. e.g. rulings from 19.2.2019 – 9 AZR 423/16 and 9 AZR 541/15). Employers have to make it possible for their employees to exercise their right to paid leave. If, despite this, employees do not then, of their own volition, take leave then it will expire.

This however requires the employers to satisfy their obligation to cooperate in the fulfilment of the leave entitlement. To this end, employers have to request, at a sufficiently early stage, that their employees

- take their specific leave,
- and inform them clearly and in good time (demonstrably and if necessary also formally) that the leave will expire after the end of the calendar year or carry-over period if employees fail to apply for leave in good time for the current year.

If, despite this, employees do not then, of their own volition, take leave then it will expire and will not have to be compensated for on termination of the employment relationship. In this context, “of their own volition” means that the employees freely choose not to take leave and that they are not prevented by their employers in this respect. Obstacles thrown up by employers could be, for example, if an employer generally refuses to grant paid minimum leave (e.g. in the case of those who are fictitiously self-employed, with the argument that the self-employed have no holiday entitlement), or if an employer always turns down leave applications.

If an employee is not able to take leave owing to prolonged illness then a special rule applies according to which leave can be carried over for up to 15 months after the end of the holiday year. Subsequently, the leave would also expire in such a case.

Recommendation

Employers should ensure that the annual leave planning for their employees happens early, at the start of the calendar year. Well before the end of the calendar year, you should check to see if the employees have submitted applications for all their leave. Employees who have not yet done so, in particular, should be urged to apply for their remaining specific leave days for the current holiday year while making reference to the precise expiry deadlines. In cases of doubt you should be able to produce proof of this. This shall also apply to leave granted over and above the statutory minimum amount, unless the parties to the employment contract make other arrangements.

RAin [German lawyer] Maha Steinfeld

Survivors' pensions – Age limit of 62 in "late marriage clauses"

Besides old-age and disability insurance benefits for their employees, the retirement schemes of many companies also provide for survivors' pensions. In this regard, there are frequently rules that make survivors' pensions subject to a particular maximum age by which time a marriage or registered partnership will have to have taken place (the so-called "late marriage clause"). The Federal Labour Court (Bundesarbeitsgericht, BAG) has now issued recent rulings on the topic of the age limit of 62 years that should be viewed in the context of the previous rules.

1. General approach

The respective clauses will be reviewed with reference to the German General Equal Treatment Act, in particular, in order to determine whether or not they constitute age discrimination clauses. In such a case, the clause would basically be invalid and the pension would have to be granted to the employee or the survivor or adjusted "upwards – a legal consequence with serious economic burdens for the respective company.

2. Previous outcomes from important BAG rulings on the "late marriage clause"

(1) Discrimination on the basis of an age limit of "60" – The starting point was a case brought before the BAG, in 2015, where the court had to rule on a late marriage clause that provided as a condition for claiming a widow's pension that the employee who was entitled to the pension would have to have got married before he reached the age of 60 years. The BAG rejected this clause as being invalid because it was "age-discriminatory" (ruling from 4.8.2015, case reference: 3 AZR 137/13).

(2) No discrimination on the basis of an age limit of "65" – By contrast, in 2017, the BAG held that a late marriage clause, according to which no entitlement to a survivor's pension would arise if the deceased employee had been 65 years or older when he had married, was indeed valid (ruling from 14.11.2017, case reference: 3 AZR 781/16).

3. New BAG ruling on discrimination in the case of a link to a fixed age limit of "62"

In two recent decisions on late marriage clauses, where an employee would only be assured a survivor's pension for his spouse if the marriage had taken place before the employee had reached the age of 62, the BAG ruled as follows.

(1) In the BAG ruling from 22.1.2019 (case reference: 3 AZR 560/17) the court decided that the clause (age limit of 62) did not violate the ban on age discrimination if reaching 62 years constituted a fixed age limit for the pension scheme; the age limit denoted when the pension benefit could be expected to be drawn.

(2) Then again, in a second case (BAG ruling on the age limit of 62 from 19.2.2019, case reference: 3 AZR 215/18; see also the BAG ruling from 19.2.2019, case

reference: 3 AZR 198/18, with an age limit of “63“), the court decided that the clause would unduly discriminate against the employee because of his age if the fixed age limit did not comply with any structural principle under the occupational pension regulations. In reaching a fixed age limit this could be the occurrence of the event giving rise to retirement benefits, or the termination of employment.

Please note: There is a clearly identifiable trend in both recent BAG rulings, namely, that a late marriage clause is not discriminatory in cases where the age limit complies with a “structural principle” related to the company pension and, thus, does not appear to be arbitrary.

Recommendation

If, due to the requirements of the court ruling, a need arises for adjustments to existing pension schemes there would have to be clarification as to whether or not an adjustment can be made to the rules of the existing pension scheme and by what means. In any case, future pension commitments should use the current standards in the supreme court rulings as a guide.

ACCOUNTING & FINANCE

WPin [German public auditor] Julia Rösger

Foreign currency conversion – Draft German Amendment Accounting Standard 10 for changes to German Accounting Standard 25

The translation of foreign currencies for consolidated financial statements as of 1.1.2019 has been regulated in the German Accounting Standard No. 25 (GAS 25). The Accounting Standards Committee of Germany (ASCG) has now published the Draft of German Amendment Accounting Standard No.10 (E-GAAS 10). Following the first time application of GAS 25, the ASCG dealt with various issues that required a clarifying supplement.

1. Adjusting for inflation

A key topic in E-GAAS 10 is the clarification of the issue of adjusting for inflation through indexing, which had resulted in increased enquiries to the ASCG, particularly in the case of hyperinflationary economies. The marginal number B44 in E-GAAS 10 refers to the index that reflects the price developments between the base year and the reporting date. In order to prevent possible misunderstandings of GAS 25, which in the case of indexing allows the interpretation that, first of all, you should proceed up to the base year and, subsequently, from the base year to the reporting date, the following has been clarified. The amendment to subsection 104 of GAS 25, which replaces the words “inflation adjustment (base year)” with “recognition of these items and the respective income and expenses” aims to achieve clear indexation from initial recognition. Furthermore, marginal number B40 has been supplemented by a clause 1. According to that, indexation and inflation adjustments should be limited to non-monetary items.

2. Translation of foreign currency

Section 308a clause 2 of the Commercial Code *(Handelsgesetzbuch, HGB)* stipulates that income statement items have to be translated at average exchange rates. Subsection 106 c) of GAS 25 was understood as a requirement that, in any case, exists to the same extent in German accounting. According to prevailing opinion, providing information about the average exchange rate does indeed fall under the general disclosure requirements in terms of the accounting recognition and measurement policies applied (Section 313(1) clause 3 no. 1 HGB) and, consequently, also has to be disclosed in consolidated financial statements. However, as the time periods used to determine the average exchange rate are what is relevant and not the mathematical method that was applied, in subsection 106, the following formulation was chosen to achieve a clear interpretation: ”reference periods used to determine average exchange rates as well as any weighting applied in the course of this”.

3. Amendments to other standards

In addition, E-GAAS 10 provides for amendments to GAS 16 "Interim Financial Reporting", GAS 19 "Duty to Prepare Consolidated Financial Statements, Basis of Consolidation" and GAS 23 "Accounting for Subsidiaries in Consolidated Financial Statements". These amendments are exclusively editorial changes that had to be made on account of the Second Act Amending Financial Market Regulations based on European legal acts *(Zweites Finanzmarktnovellierungsgesetz)*

LATEST REPORTS

WP/StB [German public auditor/ tax consultant] Daniel Scheffbuch

E-tax balance sheet – Taxonomy 6.3 is ready

Since 2012, companies that prepare accounts (e.g. all corporations) have been obliged to send their accounts electronically to the local tax office. In order to ensure that there is a standard structure for the tax office, companies are obliged to use the chart of accounts (taxonomy) of the fiscal authority. Therefore, starting from the account system (e.g. SKR 03 or 04) and chart of accounts that are actually used, companies have to arrive at the fiscal authority's taxonomy. This so-called "mapping" can be very work-intensive. In addition, the fiscal authority modifies its taxonomy from one year to the next. Indeed, the Federal Ministry of Finance published version 6.3 of its taxonomy in a circular from 2.7.2019. This version will have to be used for financial years beginning after 31.12.2019. The fiscal authority pointed out that it has taken into account the new provisions under the 2018 Investment Tax Act in the latest version of the taxonomy. Furthermore, in the case of German partnerships, the capital accounts have been subjected to stricter plausibility checks.

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

Remodelling a bathroom does not generate (pro-rata) expenses for a home office

A taxpayer may generally deduct expenses of up to € 1,250 per year for his/her home office if no other workspace for his/her business or professional activities is available to him/her. If the home office constitutes the focus of the taxpayer's entire business or professional activities then there is no limit to the expenses that can be

deducted. In this regard, the Federal Fiscal Court *(Bundesfinanzhof, BFH)*, in its ruling from 14.5.2019 (case reference: VIII R 16/15), decided that renovation and remodelling costs for rooms that are exclusively, or more than only to a minor extent, privately used do not constitute deductible expenses for a home office. The case in question involved an extensive renovation of a bathroom and a corridor at a taxpayer's residential house where there was also a home office. The taxpayer sought a pro-rata deduction of the renovation and remodelling costs incurred in proportion to the percentage of the floor space of the home office. The ruling of the BFH judges upheld the appeal of the fiscal authority. General building operating costs, such as, for instance, charges for chimney sweeping and electricity or the costs of insurance and the renovation of parts of the building may be deducted on a pro-rata basis because these concern the whole building. By contrast, the renovation costs for rooms that are almost exclusively privately used may not be taken into account as business expenses on the basis of the percentage of the floor space of the home office but, instead, have to be attributed to exclusive or almost exclusive private usage.

Please note: Renovation and remodelling costs can in any case be deducted as business expenses for a home office if they relate directly to the office.

WP/StB [German public auditor /tax consultant] Dr Dietrich Jacobs

Valuation of stakes – Sequence for offsetting reversals of impairment losses

If a corporation's stakes in another corporation have been written down to lower going concern values partially for tax purposes and partially without affecting tax then, in the opinion of the Federal Fiscal Court *(Bundesfinanzhof, BFH),* as expressed in its ruling from 19.8.2009 (case reference: I R 2/09), any subsequent reversal of impairment losses should, first of all, be offset against the tax-exempt portion of the write-down and only then against the taxable portion. The BFH, in its ruling from 13.2.2019 (case reference: I R 21/17) has now clarified that this sequence, which is generally favourable for taxpayers, should also be used in the case of reversals of impairment losses on investments in fund units at life/health insurance companies if, in the past, the units had been written down for both tax purposes and with no effect on tax. In this respect, there is no chronological offsetting sequence such that the write-down that was made first of all has to be reversed last.

WP/StB [German public auditor/ tax consultant] Dr Dietrich Jacobs / StBin [German tax consultant] Isabee Falkenburg

An atypical silent partnership holding will prevent profit tax consolidation

One of the prerequisites for profit tax consolidation consists in the subsidiary company transferring its "entire profit" to the parent company. If an atypical silent partner has a stake in a subsidiary company and receives a share of the profits then a conflict will ensue from the prerequisite for a total profit transfer.

This was the decision of the Mecklenburg-Vorpommern tax court, in its ruling from 5.9.2018 (case reference: 1 K 396/14), with respect to a case where a GmbH (private limited company) held a 100% stake in an AG (a joint stock company). In addition, this AG also held a stake in the GmbH as an atypical silent partner. The GmbH, moreover, had committed to transfer its profit to the AG via a profit and loss transfer agreement (PLTA).

The tax court concluded that through the PLTA the GmbH would not be able to transfer its entire profit if there was already an atypical silent partnership holding in its commercial enterprise. Since the transfer of the entire profit on the basis of a PLTA would have been mandatory for profit tax consolidation between the AG and the GmbH, the tax court thus refused to recognise this. The silent partnership agreement constituted a partial profit and loss transfer agreement, which did not allow the GmbH to transfer its entire profit within the scope of the above-mentioned PLTA. Ultimately, the profit transfers by the GmbH that were based on the PLTA and those that had already been made to the AG were thus not intergroup transfers but rather hidden profit distributions.

AND FINALLY...

"If you want to destroy a business, you only have to try and straighten it out with external consultants."

Prof Ferdinand Karl Piëch, (17.4.1937 – 25.8.2019), Austrian manager and major shareholder of Porsche Automobil Holding SE. From 1993 to 2002, he was the chairman of the executive board of Volkswagen AG and, subsequently, chairman of its supervisory board until 2015.

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Jungfernstieg 7 | 20354 Hamburg | Tel. +49 40 35552 - 0 | Fax +49 (0) 40 355 52-222 | www.pkf.de

Please send any enquiries and comments to: pkf-nachrichten@pkf.de

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