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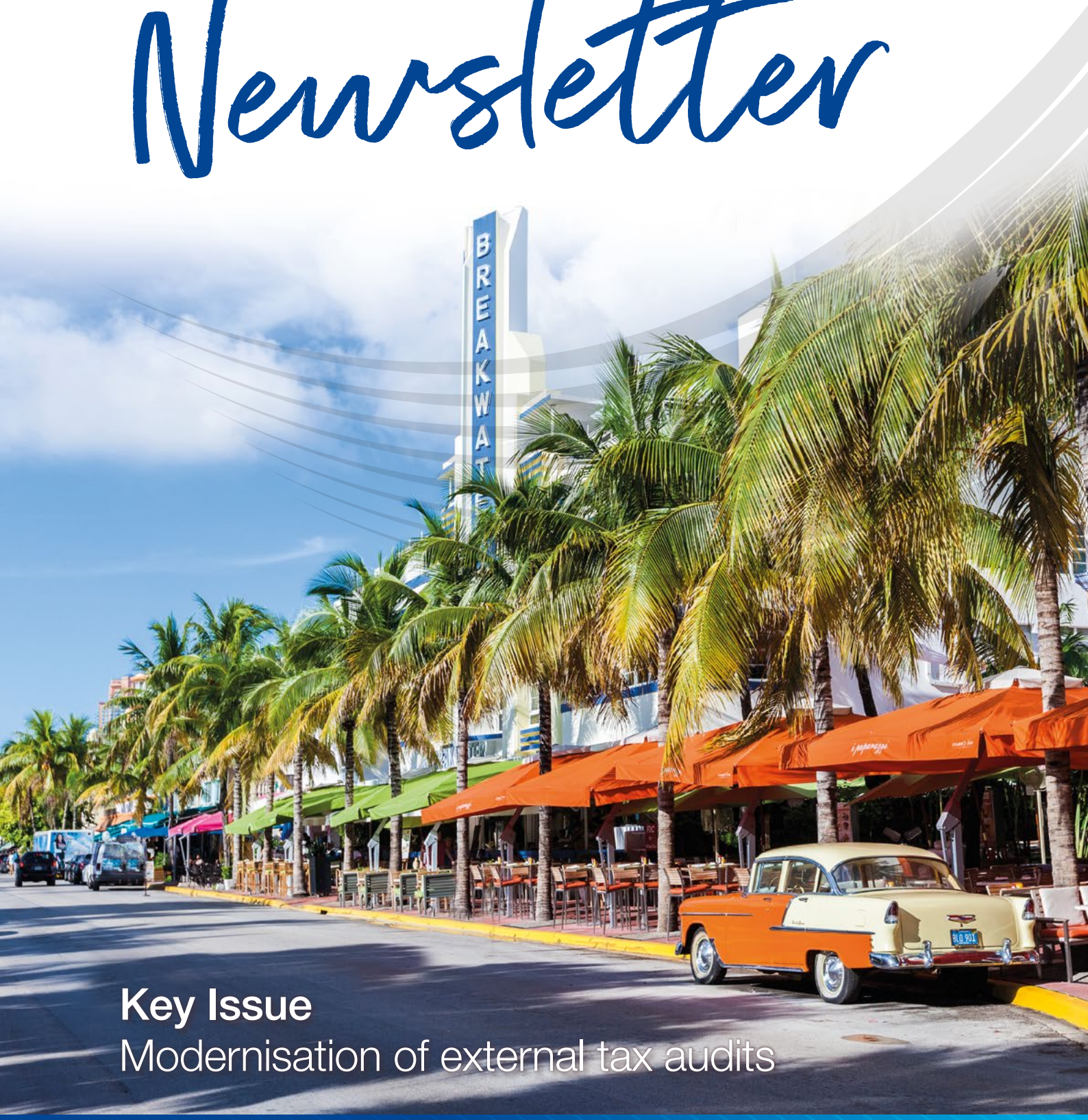
Newsletter



Key Issue

Modernisation of external tax audits

03|23

Dear Readers,

The **modernisation of external tax audits** constitutes the Key Issue in this edition of our newsletter. German lawmakers have transposed an EU Directive into the German Fiscal Code and have thus obliged companies to make corrections to their tax returns more quickly and to cooperate when requested to do so by tax auditors. Given that the fiscal administration has been provided with the possibility of imposing severe sanctions, we would recommend adapting processes for good documentation of transactions and their tax consequences.

In the second report, we give an overview of the German **Platform Tax Transparency Act**, which has been in force since the start of the year. The aim of this Act is to provide transparency over transactions executed by sellers/providers on digital platforms and, thus, to prevent tax evasion and tax avoidance by them. We subsequently take a look at the effects arising from **changes to the German Valuation Act;** the introduction of these amendments was somewhat overshadowed by the various income tax relief measures in the 2022 German Annual Tax Act. In many instances, there could be **tax increases** related to real estate **in cases of succession and gifting**. At the end of the Tax section you will find information on the problem area of the **disposal/relinquishment of a business in return for a pension**. In this respect, the Munich-based judges at the Federal Fiscal Court considered the right to choose between immediate taxation and inflow taxation.

In the context of the preparation and audit of **consolidated financial statements**, it is not only inflation in general that has gained in importance but, unfortunately, also the accounting treatment of **high inflation**. Therefore, in the Accounting and Finance section we take a look at the rules of the standard setters for **IFRS and HGB financial reporting** in relation to this complex issue.

In the Legal section, against the backdrop of the General Data Protection Regulation (GDPR), we consider **claims for damages after the so-called scraping** of personal data. In the event of data abuse the victims are entitled to compensation. Whether or not fears about data abuse are however already sufficient in order to be able to assert such a claim was a question that the Gießen regional court recently had to decide.

We then continue our journey around the international PKF locations through the illustrations that break up the reports from our experts – this time we visit Miami. This is where the first regional PKF meeting for the Latin America region took place after COVID, in September 2022.

We hope that you will find the information in this edition to be interesting.

Your Team at PKF

Front cover photo: Ocean Drive in Miami Beach

Key Issue

Modernisation of external tax audits

Contents

TAX

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

Modernisation of external tax audits – Few advantages and extensively expanded obligations

In recent years, various measures have been taken in respect of external tax audits or tax audits (TA), which constitute important parts of tax administration, in order to modernise and enhance the TA procedures. Most recently, namely in December, the Federal Cabinet approved the respective draft legislation that, a few days later still before the end of the year, was then implemented into an Act of 20.12.2022. In the following section we discuss the most important regulations, in particular, those that aim to speed up external tax audits.

1. Scope of application

The new regulations that relate to the modernisation of external tax audits form part of the Act "to Transpose the Council Directive (EU) 2021/514 ...Amending Directive 2011/16/EU on Administrative Cooperation in the Field of Taxation and to Modernise Procedural Tax Law" of 20.12.2022 that came into force on 28.12.2022 with its publication in the BGBl. [Bundesgesetzblatt, or the Federal Law Gazette] Part I (p. 2730). Under this legislation (also referred to as the DAC7 Transposition Act) businesses are obliged, in particular, to make corrections to their tax returns more quickly and to cooperate when requested to do so by tax auditors.

The new regulations that are described in the following section will be generally applicable to taxes that arises after 31.12.2024. They will however also already apply to earlier tax assessment periods insofar as tax audit notices are issued for these periods after 31.12.2024.

2. Individual regulatory areas

2.1 Obligation to correct errors pursuant to Section 153(4) of the German Fiscal Code

Under Section 153 of the Fiscal Code (Abgabenordnung, AO), taxpayers were hitherto already obliged to immediately notify the tax office of errors detected in their tax returns and to correct these. This obligation has been expanded such that, in addition, taxpayers will be obliged to correct errors in tax returns if incontestable audit findings from a tax audit mean that subsequent assessment periods would also be affected (Section 153(4) AO).

Recommendation: Therefore, subsequent amendments that arise from one audit period – insofar as their impact is not positive – should no longer be left to the next tax audit.

2.2 Limit to the suspension of the statutory limitation period for the assessment of tax liability pursuant to Section 171(4) AO

The aim of the amended version of Section 171(4) AO is to significantly speed up the execution and completion of a TA. According to the previous version of Section 171(4) sentence 3 AO, in the case of a TA, the limitation period for assessments would expire, at the latest, after the end of the calendar year in which the closing meeting took place.

The new statutory provisions now provide that, in future, the suspension of the limitation period for assessment that is initiated at the start of a TA will have to end no later than five years after the end of the calendar year in which the tax audit notice was issued. Up to now there had been no time limit and this has now been redressed.

Please note: The limit to the suspension of the limitation period for assessments would not apply in cases where the start of the external tax audit is postponed or interrupted at the taxpayer's request.

2.3 Binding partial final assessment pursuant to Section 180(1a) AO

A 'binding partial final assessment' in accordance with Section 180(1a) AO constitutes a binding decision by the tax authority on certain parts of a tax assessment which would be regarded as definitive for the respective tax assessment period. As part of the partial final assessment procedure, the tax authority will draw up a document (a

so-called partial audit report or partial final assessment notice) in order to record the results of the audit of specific transactions. In this way, a final decision can be made for the respective part of a tax assessment that will be binding for a particular tax assessment period. This means that the taxpayer will no longer have any possibility to appeal against this part of the tax assessment, however, the tax authority will not be able to make any more amendments either.

A binding partial final assessment may only be issued if the taxpayer fully and correctly discloses all the relevant facts for the final assessment. Furthermore, taxpayers will have to declare that they will refrain from initiating further investigations and producing evidence. Taxpayers will benefit from binding partial final assessments because they will obtain legal certainty for their respective transaction and it will be possible to swiftly complete their tax assessments.

Please note: The first-time application is planned for tax periods for which the external tax audit started after 31.12.2024.

2.4 Expansion of cooperation obligations pursuant to Section 90 AO

The general clause under Section 90 AO contains general provisions on cooperation obligations for those involved in the taxation procedure. Besides an editorial reclassification of the regulation, the new statutory provisions mean that there are some changes with regard to the record-keeping requirements for cross-border transactions (Section 90(3) and (4) AO). The 30-day deadline for submitting records, which was hitherto applicable solely for extraordinary business transactions, will now apply to all records, i.e. the submission deadline has been standardised and shortened.

Please note: Furthermore, in future, it will be possible to request records to be provided at any time and not solely as part of a TA.

2.5 New system of sanctions in the case of cooperation requests pursuant to Section 200a AO

The new Section 200a AO contains rules on qualified

Miami Beach - View over North Beach ocean front

requests for cooperation in the context of a TA. To ensure that taxpayers cooperate, also in cases where the duration of the suspension of the limitation period for assessments is shortened in Section 171(4) AO (as amended), a qualified request for cooperation has been introduced in the form of an enforceable administrative order with particular legal consequences in the event of non-compliance. A qualified request for cooperation may be issued, at the earliest, after six months have elapsed since notification of the tax audit order.

The compliance deadline will generally be one month from the date when the qualified request for cooperation was issued to the taxpayer. To ensure timely compliance with the qualified request for cooperation, in the event of late compliance, non-compliance, or incomplete compliance, taxpayers may be subject to a fine for delaying cooperation. For each full day of delaying cooperation this would amount to €75 (for150 calendar days at most).

Please note: In the case of repeated delays there would be a risk of an extra charge in addition to the fine for delaying cooperation. This extra charge is limited to €25,000 for each full calendar day and would likewise be set for a maximum period of 150 calendar days.

2.6 Binding assurance pursuant to Section 204(2) AO

In conjunction with the new possibility to lay down binding arrangements in advance for individual transactions in the context of an external tax audit (via a binding partial final assessment (please see Section 2.3 above), from now on, there will also be the possibility, together with the tax authority, to lay down binding arrangements for such transactions also for the future and even before the external tax audit has been completed. In terms of the contents, such binding assurance would not be any different from the usual binding assurance subsequent to the completion of an external tax audit.

Please note: The timing of such selective assurance can however be brought forward and it can be issued even during an ongoing external tax audit if a legitimate interest for early assurance can be credibly demonstrated. Otherwise, you can always still go down the route of binding assurance after the external tax audit has been completed.

3. An overview of other provisions

In addition to the changes outlined in Section 2 above, the Act contains other provisions that could play a part in

Miami – Downtown Skyline

speeding up external tax audits. We would like to highlight the following particular aspects.

- In future, once the accounting records have been submitted the auditing agency will already be able to determine the focal points of its audit (Section 197(3) to (5) AO).
- The tax authority will be able to agree with the taxpayer to meet at regular intervals to discuss its findings and the potential tax implications (Section 199(2) AO).
- In future, it will be permissible to conduct electronic negotiations and discussions (Sections 87a and 201(1) AO).
- There are moreover plans to expand data access beyond physical data carriers (so-called 'Z3 access') to digital storage sources (Section 146(6) AO); the tax authorities will be allowed to have mobile data access (Section 146(7) AO).

4. Audit simplification option when using a Tax CMS

The implementation of the legislative package outlined above also means that Tax Compliance Management Systems ('Tax CMS') will grow in importance. At the taxpayer's request – after appropriate checking by the fiscal administration as part of a TA and subject to reservation of revocation – it would be possible to use specific methods to restrict the type and scope of a future TA (piloting alternative audit methods – a type of 'risk-based audit approach' by the fiscal administration). The piloting phase for this is intended to run until 30.4.2029 (Art 97 Section 38 of the Introductory Act of the German Fiscal Code).

Recommendation

Given that the fiscal administration has been provided with the possibility of imposing severe sanctions, we would recommend adapting documentation processes in order to be able to provide proof for transactions and their tax consequences in cases of doubt.

Lai-Mei Wong

New reporting obligations for digital platform operators

The so-called Platform Tax Transparency Act *(Plattformen-Steuertransparenzgesetz, PStTG)* has been in force since 1.1.2023. This Act obliges digital platform operators to report information annually about their sellers/providers to the Federal Central Tax Office *(Bundeszentralamt für Steuern).*

1. Platforms (not) covered by the PStTG

A platform according to Section3(1) PStTG – under the Act on Reporting Obligations and the Automatic Exchange of Information on Tax Matters a reporting platform operator – will generally be any system based on digital technologies that enables users to enter into contact with each other via the internet by means of software and to conclude legal transactions by using the platform. Therefore, price comparison websites, search engines and job boards do not constitute platforms within the meaning of the PStTG because, through the above-mentioned platforms, users are made aware of offerings but the actual legal transactions are concluded outside of these portals. Moreover, the PStTG does not cover the platform of an online retailer if it solely provides its own goods in its own online shop.

Please note: It is not just the platform operators that are based in Germany that have a reporting obligation, but also those from non-qualified third countries. In this respect, the Federal Central Tax Office will publish a list of qualified third countries for the purpose of identifying these.

2. Relevant activities and information

The reporting obligation will apply for the following activities if they are performed for remuneration:

- letting of land and buildings (e.g. holiday homes),
- provision of personal services (e.g. work carried out by a tradesperson, cleaning, delivery service, etc.),
- sale of goods (e.g. trading second-hand children's clothing or books, self-produced goods),
- provision, for use, of means of transport (e.g. arranging transport services or renting out own camper van to other holidaymakers).

A platform operator has to report not only its master data but also the transaction data of all the reporting sellers/providers that perform relevant activities on its platform; such transaction data include, for example, a provider's

name, address and bank account details as well as the number of relevant activities and the amount of remuneration for the quarter.

Reporting sellers/providers will be commercial and private sellers/providers that are based in Germany or in another EU Member State. This also includes sellers/providers from third countries that lease properties located in the EU.

Please note: De minimis threshold levels have been provided for determining reporting obligations. With regard to the sale of goods, a seller's transaction data would not have to be reported if, during the reporting period, the seller executed less than 30 transactions and, in doing so, generated total remuneration of less than €2,000.

3. Time limits

Generally, a reporting platform operator has to have collected all the reportable information as at the 31.12 of the respective reporting period. The information that is collected has to be submitted annually to the Federal Central Tax Office, at the latest, by the 31.1 of the calendar year that follows the respective reporting period. Therefore, the reporting deadline for 2023 will expire on 31.1.2024.

Please note: There is an intention to publish further requirements for the reporting procedure in the course of 2023.

Recommendation

It should be noted that violations of the PStTG may be sanctioned at various levels. For example, a fine of up to € 30,000 can be levied if a report is submitted incorrectly, incompletely, late or not at all.

StBin [German tax consultant] Merle Schulte

Changes to the German Valuation Act – Hidden inheritance tax rises due to increased property values?

Changes to the Valuation Act *(Bewertungsgesetz, BewG)* came into force together with the 2022 Annual Tax Act *(Jahressteuergesetz 2022, JStG 2022)*. The new provisions apply to valuation cut-off dates after the 31.12.2022. In the following section, we have analysed whether or not a 'hidden' increase in inheritance tax could occur as a result of the uplift in property values.

1. Changes to the Valuation Act via the Annual Tax Act

While the tax breaks planned as part of the JStG 2022 were already publicised in the media early on, for a long time there was no mention of the changes to the BewG. It was only shortly before the changes came into force that there was any discussion about whether or not the amendments could lead to considerably higher tax payments. The higher property values that are the root cause for this risk can moreover affect all types of real estate. In this respect, the important changes to the BewG that need to be mentioned are the following (and will be applicable for all valuation cut-off dates after the 31.12.2022):

- The overall service life of residential properties has been raised from 70 years to 80 years.
- For the income capitalisation method, approximated operating expenses based on a percentage of the annual rent will no longer be taken into account, instead there will be a differentiated approach to assessing such costs.
- The property yields (cf. Section 188 BewG), which lower the building value, have been reduced.
- For the asset value method, regional asset value factors have been introduced and these have to be published by the committees of valuation experts.
- The valuation method for heritable building rights has been given a new basis and, in future, buildings on third-party land will be treated analogously.

2. Hidden inheritance tax rises?

The question that arises is whether or not, as a result of the adjusted valuation parameters, there is now effectively the risk of an increase in inheritance tax that is related to the changes in the BewG. The amount of inheritance tax payable largely depends on the value of the estate as well as the personal tax rate. If the real estate forms part of the inherited or gifted assets then its value has to be determined in accordance with the BewG applicable at that


Biscayne Bay with a view of the harbour

time. Thus, any changes to the BewG will have an indirect impact on the amount of inheritance tax to be assessed.

However, for a large number of towns and municipalities primacy is given to the application of property yields and asset value factors that deviate from the regulatory requirements and that the competent committees of valuation experts have been publishing for many years already. The property yields from the committees of valuation experts were normally already significantly below the legally standardised property yields and, thus, value enhancing. Although the latter have now been adjusted downwards, in part, they are still significantly above those property yields published by the committees of valuation experts.

Asset value factors for single family houses and houses divided into two flats are likewise published by the competent committees of valuation experts on a regular basis. It is still not at all clear when the regional factors will be published for the first time.

Moreover, it is important to take into account that the application of the value comparison method has to be given priority for single family houses and houses divided into two flats. If there are comparable values or comparable factors then, according to the BewG, the asset value method and thus asset value factors – as well as the amended service life – may not be applied. Comparable values are calculated on the basis of sales of the same type of properties and made available by the committees of valuation experts.

It will thus only become apparent in the future whether the modified parameters will lead to higher estimates for property values or whether, on account of the primacy given to the application of data made available by the committees of valuation experts, the 'proxy values' in the BewG will have any impact at all.

Conclusion

Many taxpayers certainly take a dim view of these changes because the taxpayers see the risk of not being able to transfer their property tax-free to the next generation. Ultimately, however, greater attention should be paid to the aim of the BewG, namely, to determine the market value (fair value) of a property in order to tax the enrichment of the buyer, which enhances financial standing. In this context, it should also be noted that, with the envisaged modifications, the intention of the German lawmakers was to accommodate the constitutional provisions with respect to a realistic valuation.

Art Deco buildings on Ocean Drive by night

Disposal of a business in return for a pension – Right to choose between immediate taxation and inflow taxation

According to a German supreme court ruling, those who dispose of their businesses and, in return, allow recurring payments to be made to them (e.g. a life annuity) by the purchasers are able to exercise the right to choose between immediate taxation and inflow taxation.

1. Distinction between immediate taxation and inflow taxation

With immediate taxation, the profits that arise can be taxed immediately, thus on the date of the disposal. In such a case, the tax-free allowance for business disposals and a reduced tax rate would be applicable. The capital gain that would have to be reported would be the difference between the present value of the pension (minus any selling costs) and the carrying amount of the capital account of the business for tax purposes. The profit component included in the pension payments would then moreover constitute other income.

Alternatively, sellers may choose so-called inflow taxation and thus spread out the tax payments over time. They may treat the pension payments, where applicable, as subsequent operating income. In such a case, the profit would only arise when the capital portion of the recurring payments exceeds the seller's capital account for tax purposes plus any selling costs they may have incurred. The interest component included in the recurring payments would constitute subsequent operating income already on the date when the payment is received.

2. The Federal Fiscal Court on exercising the right to choose

The Federal Fiscal Court (Bundesfinanzhof, BFH), in its ruling of 29.6.2022 (case reference: X R – 6/20) decided that the right to choose may also be exercised in the case of business disposals where business owners give up their businesses and only sell the operating assets in return for recurring payments. In the underlying case, a woman had given up her craft business in 2013 and had sold the operating assets to a GmbH [a German limited liability company] in return for payment of a lifelong pension in the amount of €3,000 per month. The respective

local tax office was of the opinion that, in this case, immediate taxation was mandatory. The tax office therefore calculated a gain from relinquishment that also included the net present value of the life annuity.

The BFH judges made reference to the fact that in the event of immediate taxation and the seller's early death more would have to be taxed than had actually been paid to the seller. Against this background, the settled supreme court case law has opened up the right to choose inflow taxation spread out over time.

Outcome

According to the BFH, in cases where businesses are relinquished and, at the same time, the operating assets are sold, it is likewise in the interest of the seller not to have to pay more income tax than an amount based on the pension payments that have actually been received. That is why this choice must be made available to such sellers, too.

ACCOUNTING & FINANCE

WP/StB [German public auditor/ tax consultant] André Jänichen / WP/StB Kevin Kuß

How high inflation impacts financial reporting according to HGB and IFRS

In 2022, inflation accelerated markedly around the world. In view of the large number of significant consequences for businesses and consumers, the potential impact on the financial reporting by businesses also needs to be discussed. Taking high inflation rates into account can be challenging, in particular, in the context of the preparation and audit of consolidated financial statements in accordance with the German Commercial Code *(Handelsgesetzbuch, HGB)* and International Financial Reporting Standards (IFRS).

1. Specific accounting standards for factoring in high inflation

In high inflation countries loss of purchasing power can be so severe that a comparison over time of amounts in the nominal local currency is difficult or provides little meaningful information. The aim of the standard setters consists in defining specific guidelines for companies that report in the currency of a high inflation country in order to ensure that their financial information is and remains sufficiently meaningful.

- In financial reporting according to IFRS, the IASB has regulated how to deal with above-average high inflation in IAS 29.
- The Accounting Standards Committee of Germany (ASCG) has detailed how to deal with high inflation under commercial law in its German Accounting Standard (GAS) 25.

These guidelines should be used respectively when subsidiary companies from high inflation countries have to be included in consolidated financial statements.

2. Definition of the concept of high inflation

The IASB and also the ASCG have not established an absolute rate at which high inflation is deemed to arise. Instead, discretionary leeway is allowed and indicators within the economic environment have been defined that could point to the existence of high inflation. Such indicators are that, in particular,

- amounts of local currency held are immediately invested (to maintain purchasing power),
- interest rates, wages and prices are linked to a price index, or
- the cumulative inflation rate over three years approaches, or exceeds, 100%.

Interim conclusion Taking into account the above-mentioned indicators and with a view to applying GAS 25 or IAS 29, as at 31.12.2022, the following economies have to be considered highly inflationary: Argentina, Ethiopia, Iran, Lebanon, South Sudan, Sudan, Suriname, Syria, Turkey, Venezuela, Yemen and Zimbabwe.

3. Application of IAS 29 in IFRS single entity financial statements

Where an entity's functional currency is that of a highly inflationary economy, IAS 29 requires the financial statements of that entity to be stated consistently in terms of

the measuring unit current at the balance sheet date. To this end, balance sheet as well as profit and loss items will potentially need to be restated with the aid of a general price index. Comparative figures for prior periods should also be restated.

Here, IAS 29 requires a restatement for non-monetary assets and liabilities, equity capital as well as all items in the statement of comprehensive income. Monetary items are not restated because they are already or should be expressed in terms of the measuring unit current at the balance sheet date. Non-monetary items are restated on the basis of changes in a general price index from the dates that the items were purchased or acquired and up to the balance sheet date. This will result in a significant increase in the carrying amounts of non-monetary assets. Examples that could be mentioned here

… of monetary items: cash and cash equivalents, trade receivables, trade payables, income tax;
… of non-monetary items: accrued/prepaid expenses, inventories, equity interests held in associates, property, plant and equipment, intangible assets, equity capital , deferred income.

Non-monetary assets that have been restated in terms of the measuring unit current at the reporting date, in accordance with IAS 29, would still have to be subjected to an impairment test. If the recoverable amount for an asset is below that of its restated amount then the asset is written down even if on the basis of historical acquisition or production costs it would not have been necessary to report an impairment of the asset in the financial statements. Any impairment loss is recognised as an expense.

Please note: Companies that have tested assets for impairment in earlier reporting periods will have to analyse whether or not the inflation-related restatement of the carrying amounts of the assets affects the result of the impairment test.

4. Special rules in consolidated financial statements ...

4.1 … according to IFRS

When IFRS consolidated financial statements are being drawn up it is necessary to take into account IAS 21.43; this requires that where the functional currency of a subsidiary company is that of a highly inflationary economy then the financial statements have to be restated in accordance with IAS 29 before the subsidiary is included in the consolidated financial statements. IAS 29 is applied to all of the subsidiary company's assets and liabilities before the translation into another currency. In this respect, it should be noted that fair value adjustments as well as any goodwill from the acquisition of the subsidiary company would likewise have to be restated in accordance with IAS 29. All the amounts in the subsidiary company's financial statements are subsequently translated into another currency at the closing rate on the reporting date.


Aventura Lakes

Comparative amounts that were previously expressed in a stable currency are not restated.

Furthermore, there are additional requirements with respect to disclosures in the notes to the consolidated financial statements that have to be complied with. These includes, for example,

- information about the gain or loss on the net position of the monetary items,
- the type and level of the price index at the reporting date,
- changes in the index during the current and the previous periods as well as
- a description of the method used for adjusting inflation.

4.2 … according to HGB

In HGB consolidated financial statements, as under IFRS, indexation can be done to adjust for high inflation at the subsidiary companies concerned. Alternatively, adjustments can be made to take account of inflation by drawing up financial statements in a hard currency. The guidelines on disclosures in the notes to the financial statements similarly apply.

When preparing financial statements where the items are stated in a hard currency, the non-monetary assets are translated at historical rates of exchange and carried forward in accordance with general principles (Section 253(3) – (5) HGB). Lower fair values (Section 253(3) sentence 5 and (4) sentence 1 HGB) and monetary items have to be translated at the closing rate. The equity items are not translated at historical rates of exchange. Instead, equity arises as the residual amount in the financial statements expressed in hard currency.

P&L items – with the exception of depreciation and material costs that are translated at historical rates of exchange – are translated at actual rates of exchange.

LEGAL

Data abuse fears – Claims for damages after scraping?

The General Data Protection Regulation (GDPR) brought a lot of uncertainties in its wake, but above all the promise of greater data security, too. Many consumers have grown very accustomed to this as regards the use of personal data. In the event of data abuse the victims are entitled to compensation. Yet, despite the necessary caution and justified scepticism, are fears about data abuse already sufficient in order to be able to assert such a claim? This was a question that the Gießen regional court had to answer.

1. Data collection by means of scraping

In the course of registering online in the internet, a man had entered his first and last names, his date of birth and his sex. Providing a mobile phone number was admittedly not mandatory, nevertheless, the man had also entered this. Subsequently, third parties had used automated processes to collect a wide variety of public information available on the company's platform (so-called 'scraping'). Thereafter, these scrapers added the telephone number linked to the account of the user concerned to the publicly available information taken from his profile. In April 2021, the scraped data records of more than 500m users as well as the telephone numbers linked to these data records were made freely available for downloading.

2. Automated bulk queries as a security vulnerability?

The man's profile information that was always publicly available was also among these data records along with the telephone number that was linked to his account. The man now claimed that the company had taken absolutely no security measures to prevent his data being acquired. The fact that an automated bulk query had been possible constituted a security vulnerability. He had sustained a considerable loss of control over his data and felt extremely anxious and worried because he feared that the data would be abused. He ultimately claimed compensation for non-material damages in the amount of €1,000.

3. Compensation only if damages set out in concrete terms

However, the outcome was that the Gießen regional court dismissed the claim with it its ruling of 3.11.2022 (case reference: 5 O 195/22). In the opinion of the court, a mere infringement of GDPR requirements is not sufficient grounds for being able to demand compensation already. Rather, it is necessary to demonstrate that spe-

cific damages have been incurred. Although, in doing so, the damage that has been suffered would not need to be considerable – even minor damage would be eligible for compensation.

IN BRIEF

The German tax group for VAT purposes is in need of reform – Landmark ECJ judgements

Two referrals by the Federal Fiscal Court *(Bundesfinanzhof, BFH)* brought before the ECJ the question as to whether or not the German regulation according to which it is not the VAT group as such but rather solely the parent/controlling company that is designated as the taxable person is actually in line with EU law. The ECJ, in its decisions of 1.12.2022, did not completely overturn the German regulations on tax groups but did demonstrate that there is a need for reform.

In its judgements of 1.12.2022 (cases.: C-269/20; C-141/20), the ECJ clarified that a Member State is able to designate a parent/controlling company as the taxable person who is liable for the VAT of the group as a whole. The reason provided for this was that tax groups simplify the assessment and collection of taxes. It is then irrelevant who fulfils the obligation of submitting returns and paying the tax, provided that this taxable person is in a position to impose their will on the other companies forming part of that group.

With regard to the criterion of financial integration, the ECJ reaffirmed its view that – contrary to German case law – a parent/subsidiary relationship is not absolutely essential for the formation of a single entity for VAT purposes. Furthermore, the ECJ stated that where there is ownership of a majority stake in the subsidiary company there is no additional need to hold a majority of the voting rights.

As regards the independence of a group's subsidiary/controlled companies, in the arguments put forward by the ECJ it was still unclear whether or not exchanges of services between members of the group consolidated for tax purposes are indeed taxable. In the view of the Court, a group's subsidiary/controlled companies, despite their integration, should be able to continue carrying out economic activities independently. This would result in a considerable additional burden for VAT groups in, for example, the hospital, care home and insurance sectors.

Moreover, the ECJ decided that a tax group also encompasses a parent's/controlling entity's non-economic activities or those carried out in the exercise of its powers as a public authority. This is significant insofar as public authorities are not entitled to deduct input tax and the non-taxability of intra-company services results in cost savings via the tax group.

Please note: The subsequent BFH rulings based on the ECJ judgements and any changes to the German legal position remain to be seen.

The multi-tier group – Which is the controlling company and which is the dependent company?

In the event of intra-group restructuring, under certain conditions, it is possible to avoid real estate transfer tax (RETT) via the so-called corporate group clause in Section 6a of the German Real Estate Transfer Tax Act. The Federal Fiscal Court *(Bundesfinanzhof, BFH)* carefully considered this provision in a new ruling and, in doing so, clarified an open legal issue in this respect.

The claimant, itself a company, held an interest in a property-owning company. The claimant's shareholder was, in turn, a GmbH [a German limited liability company] whose shares were held by an AG [a German joint stock company]. The shareholdings had existed for more than five years and amounted to 100% in each ease. In 2011, the property-owning company was merged into the claimant by which means the company's properties passed over to the claimant. The respective local tax office granted the tax concession for this under the corporate group

clause. In 2013, the AG sold more than 25% of its shares in the GmbH to a third party. The local tax office was of the opinion that the conditions for the tax concession had retrospectively ceased to be satisfied and accordingly issued an amended tax assessment. The tax court upheld the case against this.

The BFH, in its ruling of 28.9.2022 (case reference: II R 13/20) has now rejected the local tax office's appeal on the grounds that it was unfounded; moreover, the court decided that the transfer of the ownership of the property – that was brought about by the merger – was admittedly subject to RETT, however, this acquisition was exempted from RETT under the rules of the corporate group clause. Under this regulation, RETT is not levied on taxable reorganisation transactions, in particular, if a so-called controlling company and a so-called dependent company are involved in the transaction. The requirement for this is that a shareholding of 95% has to have existed five years prior to and five years following the reorganisation transaction – it may also still exist. However, the prior and subsequent holding periods only have to be complied with if this is also possible on legal grounds.

The legal question at issue in this case, namely, in a multi-tier group of companies which one should be regarded as the controlling company and which one as the dependent company, had hitherto still been open. The BFH has now explained that this is solely determined by the respective reorganisation transaction for which, according to the corporate group clause, tax should not be levied.

Example: If subsequently, for example, in a three-tier group of companies with parent, subsidiary and lower-tier subsidiary companies, the lower-tier subsidiary company is merged into the subsidiary company then, in the case of such a reorganisation transaction, the subsidiary company would be the controlling company and the lower-tier subsidiary company the dependent company. It is only in this relationship that there has to be a 95% shareholding prior to the reorganisation transaction. For that reason, the parent company's shareholding in the subsidiary company is irrelevant.

Current accounts – Continued use does not constitute automatic consent to the new GTCs

Many banks and *Sparkassen* [savings banks] have been trying for months to enforce their new terms and conditions. Recently, the Hanover regional court decided that continued use of a current account does not constitute automatic consent to new contractual terms and conditions.

In mid-2022, a German cooperative bank sent to its customers a written request for explicit consent to its new contractual terms and conditions. Those customers who did not respond to this were subsequently sent another letter in which the cooperative bank informed them that future use of their accounts would be deemed to be consent. This would apply to electronic transfers, ATM withdrawals and cashless payments. The Federation of German Consumer Organisations became aware of these business practices. Thereupon, it took legal action against the cooperative bank and was successful in obtaining a cease-and-desist order.

Even in the eyes of the judges at the Hanover regional court (ruling of 28.11.2022, case reference: 13 O 173/22) the actions of the bank clearly constituted a clear violation of competition rules. Moreover, they violated the basic principles of contract law and unreasonably disadvantaged consumers.

Outcome: Therefore, by continuing to use their accounts the bank's customers would not automatically consent to the contractual amendments. The contractual terms and conditions can only be changed with the explicit consent of the other contractual partner.


Miami Beach - South Beach lifeguard tower

AND FINALLY...

“Inflation – an unforgivable sin.”

Ludwig Erhard, 4.2.1897 to 5.5.1977, was a prominent German economic policy maker (CDU). From 1957 to 1963 he was Vice-Chancellor and from 1963 to 1966 the second Federal Chancellor of the Federal Republic of Germany.

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