Monthly information

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Lösungen für deine Steuern

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Good day,

whether a dwelling is "used for own residential purposes" is often a central question in tax proceedings. Recently, the Düsseldorf Fiscal Court commented on the taxability of a private sale transaction, particularly on the decision as to when an apartment is used for own residential purposes.

If the divorced spouse sells his or her co-ownership share in the joint single-family home to the former spouse as part of the division of assets on the occasion of the divorce, can the sale be subject to taxation as a private sale transaction? This question had to be decided by the Federal Fiscal Court.

In addition, the Federal Fiscal Court ruled that the 20% reduction in income tax on expenses for a home emergency call system cannot be claimed if the system merely establishes contact with a 24-hour service center in the event of an emergency.

There is a lot going on in procedural law! The second part of the DAC 7 Implementation Act aims to modernize and accelerate changes to tax procedural law, i.e. the tax audit.

Do you have any questions about the articles in this issue of Monthly Information or about other topics? Please contact us.
We will be happy to advise you.

Income tax

Taxation on the sale of an apartment: differentiation in the case of "use for own residential purposes

In the case of "use for own residential purposes" as defined by the German Income Tax Act, a distinction must be made between children to be taken into account for income tax purposes and third parties, who may also be entitled to maintenance. This was the decision of the Düsseldorf Fiscal Court.

Assets are exempt from taxation as private sales transactions if they were used exclusively for the taxpayer's own residential purposes in the period between acquisition or completion and sale. If the taxpayer does not leave the apartment exclusively to a child (or several children) to be taken into account for income tax purposes for use free of charge, but at the same time to a third party, there is no preferential use by the taxpayer for his own residential purposes.

A dwelling provided free of charge by the taxpayer for maintenance purposes is no longer (indirectly) used for the taxpayer's "own residential purposes" if, in addition to a child to be taken into account for income tax purposes, the property is also left to other relatives - who may also be entitled to maintenance on the basis of civil law provisions. Against this background, the (joint) use by another child who is not (no longer) to be taken into account for income tax purposes due to his age also leads to the fact that the apartment as a whole is no longer to be regarded as used for the taxpayer's own residential purposes. Therefore, other income from a private sale transaction was rightly to be taken into account due to the sale of the condominium.

Interest from discounting of a purchase price paid in installments as income from capital assets

The Cologne Fiscal Court ruled that the interest portion included in the purchase price installments constitutes income from capital assets. Income from capital assets includes income from other capital claims of any kind if repayment of the capital asset or remuneration for the transfer of the capital asset for use has been promised or granted. This applies irrespective of the designation and the civil law structure of the capital investment.

If an item belonging to the private assets is sold and the purchase price receivable is deferred for a long period - longer than one year - until a certain date, the payments made (purchase price installments) are to be broken down into a repayment portion and an interest portion. The latter is subject to income tax as income from other capital claims. This also applies if the contracting parties have not agreed on interest or have even expressly excluded it. The granting of long-term installment payments to repay a debt constitutes the granting of a loan by the creditor. The agreement of a value protection clause does not change this, since the division of the total purchase price as the sum of the installment payments into the purchase price as consideration and the interest as remuneration for the use of the capital is independent of the will of the contracting parties. The basis for this is found in Section 12 (3) of the Valuation Act, according to which non-interest-bearing receivables with a term of more than one year and which are due on a certain date are to be discounted, i.e. divided into a capital and an interest portion. This provision cannot be waived. In this respect, tax law differs from civil law.

No third-party challenge in the case of assessment notices on the tax contribution account

The shareholder of a corporation is not entitled to challenge the notice issued against the corporation regarding the separate determination of the balance of the tax contribution account. This was the decision of the Federal Fiscal Court.

The corporation as the addressee of the assessment notice has the right of action, irrespective of the primarily shareholder-related effects of the notice. A substantive effect of the assessment notice for the shareholders of the corporation does not establish a right of third-party appeal. Furthermore, Article 19 (4) of the Basic Law does not require that the shareholder be granted a right of third-party appeal. The relationship between the corporation and its shareholders is governed by the so-called principle of separation, but this does not mean that the two levels are "unrelated" to each other. Rather, the company and the shareholders are linked by a partnership agreement and the shareholders can use their resulting powers (e.g. information rights) to cause the corporation to file objections against allegedly unlawful assessment notices.

No tax reduction for expenses for a home emergency call system without immediate assistance

The plaintiff had equipped her apartment with a home emergency call system. However, the contract concluded with the provider only included the provision of the home emergency call device and 24-hour on-

call service. The tax office did not consider the claimed expenses for the home emergency call system as a household-related service. However, the tax court upheld the claim.

The Federal Fiscal Court held that the decision of the tax office was lawful. The tax reduction under Section 35a of the German Income Tax Act can only be claimed for household-related services provided in the taxpayer's household. The latter requirement is lacking here, because the plaintiff essentially pays for the on-call service set up by the provider of the home emergency call system and for the receipt of any emergency call. The on-call duty and the acceptance of incoming emergency calls in the service center as well as, if necessary, the notification of third parties so that they can provide assistance on site, takes place outside the plaintiff's home and thus not in her household.

Note

The ruling differs from the decision of the Federal Fiscal Court regarding expenses for an emergency call system in a senior citizens' residence. There, the emergency call was made directly to a nurse via a so-called beeper, who then also took over the necessary emergency on-site assistance.

Determination of the remaining loss carryforward for forward transactions

According to the German Federal Fiscal Court, the assumption of an offsetting profit correlation in the case of a forward transaction as a hedging transaction requires that the forward transaction at least partially hedges a risk resulting from the underlying transaction.

An offsetting correlation of the results of the underlying transaction and the hedging transaction does not exist if, as a result of the agreement of an interest rate currency swap, the risk of the variable interest rate of a loan is not only replaced by another risk (currency), but the original underlying transaction is also effectively
burdened with risks similar to those of a foreign currency loan and thus exposed to additional risks. In the case of losses from forward transactions arising from participation in a partnership, the determination of the remaining loss carryforward is not to be made at the level of the partnership, but at the level of the participating partners in their income tax assessments.

Sale of a co-ownership share in a single-family house on the occasion of divorce taxable as a private sale transaction

If the divorced spouse sells his or her co-ownership share in the joint single-family home to the former spouse as part of the division of assets on the occasion of the divorce, the sale may be subject to taxation as a private sale transaction. This was the decision of the Federal Fiscal Court.

According to the Federal Fiscal Court, a taxable private sale transaction exists if a property is acquired and resold within 10 years. This also applies to a half co-ownership share that is sold by one co-owner to the other in the course of property distribution following a divorce. It is true that the sale of a property is not taxable if the property is used for the owner's own residential purposes throughout the period between acquisition and sale or in the year of sale and in the two preceding years. However, a spouse in the process of divorce no longer uses the real estate property co-owned by him or her for his or her own residential purposes if he or she has moved out and only his or her divorced spouse and the joint child continue to live there. In this case, there was no predicament that precluded the existence of a private sale transaction, such as in the case of expropriation or a compulsory auction. It is true that the divorced wife had put her ex-partner under considerable pressure. Ultimately, however, he voluntarily sold his share in the single-family house to his divorced wife.

Trade tax

Rented premises as fictitious fixed assets - Only "product" of the trade decisive for delimitation

The Berlin-Brandenburg Fiscal Court commented on the half-tax addition of charges for the rental of employee accommodation and on the consideration of a hidden profit distribution.

An item may be classified as a fixed asset even if it is only rented or leased for a short period of time; this applies even if the rental or lease relationship extends for only days or hours.

Based on the purpose of the business, only the "product" of the trade can provide decisive demarcation criteria for deciding whether rented premises are fictitious fixed assets or current assets. Premises rented for the accommodation of employees are fictitious fixed assets if the existence of the premises is absolutely necessary in order to be able to carry on the business at all.

In this case, a decision was also made on another aspect: When assessing expenses for celebrations or for the entertainment of guests under tax law, the occasion of the event in question is decisive above all. The expenses incurred by a GmbH for hosting a party on the day of a milestone birthday of its majority shareholder and managing director constitute a hidden distribution of profits if the company is unable to prove that the event was held for business purposes.

Other

No deduction of "final" foreign permanent establishment losses

The German Federal Fiscal Court (Bundesfinanzhof) has issued an important ruling for German companies operating internationally. According to this ruling, domestic companies cannot offset losses from a branch located in another EU country against profits generated in Germany to reduce tax if, under the relevant agreement for the avoidance of double taxation, there is no German right of taxation for the foreign income. According to the judges, this also applies if the losses abroad cannot be utilized under any circumstances for tax purposes and are therefore "final" (so-called final losses).

In the case in question, a German-based bank opened a branch in the UK in 2004. However, after the branch had consistently generated only losses, it was closed again in 2007. As the branch had never made a profit, the bank was unable to utilize the losses incurred in the UK for tax purposes there.

The Federal Fiscal Court ruled that the losses could not be used in Germany either, because under the relevant treaty for the avoidance of double taxation, permanent establishment income from the UK is not subject to German taxation. The decisive factor here is the "symmetry theory", according to which the tax exemption of foreign income under treaty law includes both positive and negative income, i.e. losses. As the judges further ruled after referring the matter to the Court of Justice of the European Union, this exclusion of loss deduction does not violate EU law even regarding so-called final losses.

Federal Council approves smart meter law

In its session of May 12, 2023, the Bundesrat (upper house of the German parliament) approved the law passed by the Bundestag to relaunch the digitization of the energy transition. The aims of the law are the unbureaucratic and faster installation of intelligent electricity meters - so-called smart meters - and thus the expansion of a "smart grid". The devices are intended to help use energy efficiently and cost-effectively, as well as relieve the burden on the power grid.

The Bundesrat (upper house of the German parliament) discussed the German government's original bill in its plenary session on March 3, 2023 and commented extensively on it. The Bundestag took up some of the Bundesrat's criticisms in its resolution on the bill. In addition to extensive formal amendments, it also contains improvements with regard to the installation of smart meters in multi-family buildings.

The law will now be forwarded to the Federal President for signature via the Federal Government. It enters into force on the day after promulgation in the Federal Law Gazette. The exact date is determined by the federal government, as it organizes the promulgation.

DAC7 Implementation Act "Modernization of the Tax Audit".

The aim of the DAC7 Implementation Act is, among other things, to shorten the sometimes-long periods between the start and conclusion of an external audit, i.e. to accelerate and speed up the performance of tax audits. The intended

However, the intended acceleration is often to be achieved by tightening up the situation for the taxpayer.

Thus, the obligations to cooperate will be further tightened. Records must then be submitted (applicable for the first time to taxes and tax refunds arising after

December 31, 2024) within a period of 30 days after the request or after notification of the audit order.

Another burdensome aspect is the obligation to take audit findings into account in other tax returns and to correct them if there is a change in the basis of taxation. The result is a further shift of tasks from the tax authorities to the taxpayer.

In the future, the tax authorities will also be able to request accounting documents when the audit order is issued, which must be submitted within a reasonable period of time, if necessary even before the start of the external audit. Based on the documents then submitted, the focus of the audit can be determined for the external audit. If documents have been submitted, the taxpayer should be informed of the intended focal points of the external audit. However, the specification of focal points of the audit does not constitute a restriction of the external audit to certain facts. The audit order shall be issued by the end of the calendar year following the calendar year in which the tax assessment became effective. A later notification shall not postpone the start of the period for the suspension of expiry.

A completely new instrument is introduced with the qualified cooperation request. This allows the external auditor to decide at his own discretion to request the taxpayer to cooperate in writing or electronically after the expiry of six months from the date of notification of the audit order. If the taxpayer fails to cooperate or fails to cooperate sufficiently, a fine is imposed. This cooperation delays fine amounts to 75 euros for each full calendar day of the cooperation delay and can be levied for a maximum of 150 calendar days (max. 11,250 euros). In addition to a delay in cooperation, a surcharge may be imposed if certain conditions are met. The surcharge amounts to a maximum of 25,000 euros for each full calendar day of the delay in cooperation and may be levied for a maximum of 150 calendar days.

Improvements have also been made to electronic data access. In the future, the tax authorities will be able to demand that the data be transferred to them in a machine-readable format in accordance with their specifications. It is also stipulated that this data may also be stored on mobile data processing systems, for example on the auditor's laptop.

It is also hoped that the new regulation on the suspension of expiration will speed up external audits. A new time limit has been introduced for this purpose. The suspension of expiration ends no later than five years after the end of the calendar year in which the audit order was announced.

Civil law

WEG: No right to consent to the installation of a solar system on the balcony

An apartment owner is not entitled to consent to the construction of a balcony power plant. It does not matter whether the overall visual impression is impaired by the structural measure. This was the decision of the Constance Local Court.

The tenant of an apartment had a mini solar system installed on the outside of his balcony with the consent of his landlords (owners). The module was black, had an area of 168 cm x 100 cm and was connected to an inverter. At an owners' meeting, a resolution was passed by a majority, according to which the balcony power plant was to be removed. The action of the two apartment owners was directed against this.

The court dismissed the action. The condominium owners have no right to the approval of the mini solar power plant. The other apartment owners do not have to agree to the construction of a balcony power plant. § Section 20 (1) WEG contains a so-called building block for structural changes without the consent of the owners. The installation of the photovoltaic system represents such a change, without it being a matter of an intervention in the substance. It is also irrelevant whether the overall visual impression of the residential complex is impaired by the structural measure. In any case, this is the case here. The mini solar plant is considerably perceptible. There is a relevant, not insignificant impairment. Legal policy considerations, however convincing they may be, are not sufficient.

Dates Taxes/Social Security June/July 2023

Control type		Maturity	
Wage tax, church tax, solidarity surcharge		12.06.2023[1]	10.07.2023[2]
Income tax, church tax, solidarity surcharge		12.06.2023	not applicable
Corporate income tax, solidarity surcharge		12.06.2023	not applicable
Sales tax		12.06.2023[3]	10.07.2023[4]
End of grace period of above tax types when paid by:	Bank transfer[5]	15.06.2023	13.07.2023
	Check[6]	12.06.2023	10.07.2023
Social security[7]		28.06.2023	27.07.2023
Capital gains tax, solidarity surcharge		The capital gains tax and the solidarity surcharge on it must be paid to the responsible tax office at the same time as a profit distribution is made to the shareholder.	

1 For the past month.

2 For the past month, for quarterly payers for the past calendar quarter.

3 For the past month, in the case of permanent extension for the penultimate month.

4 For the past month, in the case of a permanent extension for the penultimate month, for quarterly payers without a permanent extension for the past calendar quarter.

5 As a rule, advance VAT returns and wage tax returns must be submitted (electronically) by the 10th of the month following the filing period. If the 10th falls on a Saturday, Sunday or public holiday, the next working day is the deadline. No late fees will be charged if payment is up to three days late. A remittance must be made early enough so that the value date on the tax office's account is the same as the due date.

6 If payment is made by check, it should be noted that payment is not considered made until three days after the check is received by the tax office. A direct debit authorization should be issued instead.

7 Social security contributions are uniformly due on the third last bank working day of the current month. In order to avoid late payment penalties, the direct debit procedure is recommended. All health insurance funds have a uniform deadline for the submission of contribution statements. These must be received by the respective collection agency no later than two working days before the due date (i.e. on 26.06.2023/25.07.2023, 0:00 hours in each case). Regional peculiarities with regard to the due dates may have to be taken into account. If payroll accounting is performed by external agents, the payroll data should be transmitted to the agent approximately ten days before the due date. This applies in particular if the due date falls on a Monday or on a day after a public holiday.