

## How do you do?

the Federal Fiscal Court ruled that the naming of a place of employment in an employment contract does not in itself determine a permanent assignment to a fixed business establishment of the employer.

In a further ruling, the Federal Fiscal Court had to decide whether expenses for an official residence are necessary additional expenses in the particular circumstances of the dispute, regardless of its size.

The Federal Fiscal Court believes that the benefits do not result in income subject to income tax for the recipient. In the case of business associates, this is to be denied if, for example, events merely serve to maintain and intensify customer contact.

From the 2023 assessment period, it will be necessary to provide a tax identification number for the electronic transmission of wage tax certificates. A current letter from the Federal Ministry of Finance regulates the procedure in cases where the employer does not have the employee's tax identification number.

The European Court of Justice considers the VAT liability of business equipment rented out as VAT-exempt property to be incompatible with the VAT Directive under the German VAT Act.

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

For income taxpayers

## Assignment of the first place of work of an employed site manager

A site manager worked for a public limited company. Among other things, the AG had a fixed company facility at a location (AG branch) which was only referred to as the "place of employment" in the plaintiff's employment contract. He had a company car - also for private use - at his disposal, the use of which was considered by the employer in the payroll statements as a non-cash benefit by the 0.03% rule. The construction manager argued that he did not have a primary place of work at his employer's headquarters. Explicit agreements on an assignment to the fixed place of business had not been made. Instead, he carried out an external activity in the form of a so-called alternating assignment. The tax office believed that the employer had assigned the site manager a first place of work.

The Federal Fiscal Court ruled in favor of the site manager. The naming of a place of employment in an employment contract does not in itself determine a permanent assignment to a fixed business establishment of the employer. Therefore, the construction manager's salary is rightly to be reduced by the amounts resulting from the application of the 0.03% rule and the claimed additional meal expenses are to be recognized as income-related expenses. The commuting allowance should not be applied.

A tacit assignment of an employed site manager to a fixed business facility of the employer does not result solely from the fact that the site manager only must visit the specific business facility occasionally to carry out his professional activities (e.g. meetings), but otherwise performs his work predominantly outside the fixed facility. The same applies if the employer has applied the 0.03% rule in the payroll statements for the private use of the company car provided to the employee, according to the Federal Fiscal Court.

## Deductible accommodation costs for double housekeeping abroad

The Federal Fiscal Court had to decide whether expenses for an official residence in the circumstances of the dispute (compulsory occupation of an official residence abroad provided by the employer together with the associated deduction of the official

residence allowance from the remuneration) are necessary additional expenses irrespective of their size.

In the case of double housekeeping abroad, it must be examined on a case-by-case basis which accommodation costs are necessary. Contrary to the administrative opinion (letter from the Federal Ministry of Finance dated 25.11.2020), the Federal Fiscal Court ruled that there is no flat-rate limit for a second home abroad (average rent for 60 sqm).

In the case of an official residence assigned under civil service law, the accommodation costs at the foreign place of employment are always deductible in the actual amount as income-related expenses in the context of double housekeeping.

### No flat-rate taxation for benefits in kind provided by a credit institution to its private customers for general customer care purposes

A credit institution invited various wealthy private clients managed by its Management Board to two events (a boat trip with wine tasting and a golf tournament). No specific products were advertised at these events. Nor did the invitations contain any reference to a specific investment or possible advisory meetings. All of the private customers invited had at least one savings and/or current account with the bank. Some of these private customers had also invested in very different securities through the bank. Around 20 % of the private customers had provided the bank with capital for a fixed interest rate and a fixed term. A small proportion of the private customers invited had also received a loan. The bank subjected the event costs to flat-rate tax by Section 37b EStG and reported them in the income tax returns.

However, the Federal Fiscal Court believes that benefits in kind from a credit institution to its private customers, which serve to **maintain the business relationship, do** not lead to lump-sum taxation by Section 37b (1) EStG. The benefits in kind in dispute - unlike the usual investment income within the meaning of Section 20 EStG - were not calculated according to the individual capital investment, but as a lump sum and were therefore granted irrespective of the capital investment.

## Taxation of the energy price flat rate questionable

From September 2022, the energy price lump sum (EPP) of 300 euros was paid out as compensation for the high energy costs. Employed persons, pensioners and the self-employed benefited from the one-off payment. However, this lump sum is subject to income tax or the tax office assumes that it is taxable.

However, as there are also opinions to the contrary, a lawsuit is pending before the Münster Fiscal Court and the Mecklenburg-Western Pomerania Fiscal Court regarding the legality of the taxation of the energy price lump sum.

It therefore remains to be seen whether the Federal Fiscal Court or the Federal Constitutional Court will soon scrutinize the tax liability of this lump sum.

An appeal can be lodged against the 2022 income tax assessment to preserve a possible tax exemption. However, there is no legal right to suspend the proceedings.

### Note

For example, employees can see whether they have received the energy price allowance from their employer by the entry "capital letter E" in the wage tax statement for 2022.

## Sale of a garden plot is taxable as a private sale transaction

The taxpayers acquired a plot of land with an old farm building. They lived in the building themselves. The building was surrounded by a plot of land measuring almost 4,000 square meters. The taxpayers used this as a garden. They later divided the property into two sections. They continued to live in the house on one part of the property and sold the other - undeveloped - part of the property. The taxpayers claimed an exemption from income tax on the capital gain due to use for their own residential purposes.

Profits from the sale of property are generally taxable as a so-called **private sale transaction** if the purchase and sale of the property take place within ten years. An exception to taxation only applies if the property is occupied by the taxpayer. In the absence of a building on a plot of land, undeveloped land cannot be occupied. This also

applies if a part of the property previously used as a garden is separated and then sold. This was decided by the Federal Fiscal Court.

## Determining the tax identification number of employees for the electronic transmission of wage tax certificates

From the 2023 assessment period, a **tax identification number will be** required for the electronic transmission of wage tax certificates.

A current letter from the Federal Ministry of Finance regulates the procedure in cases where the employer does not have the employee's tax identification number.

If the employer has submitted an income tax statement for the employee for the year 2022 and the employer assures that the employment relationship continued after the end of 2022 and the employee has not yet provided his identification number despite being requested to do so, the competent tax office will provide the employee's identification number upon informal written request from the employer.

Irrespective of this, the employer can generally request the allocation or notification of the employee's tax identification number from the relevant tax office if the employee has authorized them to do so.

If the employee culpably fails to provide the employer with the tax identification number and the employer is nevertheless unable to obtain it from the tax office, the employer must regularly calculate the wage tax according to tax class VI.

Only in cases where the employee is not responsible for the lack of notification of the tax identification number or the employer is unable to retrieve the tax identification number due to technical faults can the employer use the expected tax class as a basis for calculating income tax for a maximum of three calendar months.

## What is the "Progressionsvorbehalt" all about?

The Income Tax Act contains the term "progression proviso". This term covers two groups for which the progression proviso is applied.

1. domestic wage and income replacement benefit by (Section 32b (1) sentence 1 no. 1 EStG).
2. Foreign income.
  - foreign income **with temporary unlimited tax liability** (Section 32b (1) sentence 1 no. 2 EStG).
  - tax-free foreign income based on a double taxation agreement - DTA (Section 32b (1) sentence 1 no. 3 EStG).
  - tax-free foreign income **based on other intergovernmental agreements** (Section 32b (1) sentence 1 no. 4 EStG).
  - Income of cross-border commuters, spouses of EU/EEA foreigners and certain employees with limited tax liability (Section 32b (1) sentence 1 no. 5 EStG).

The principle of individual ability to pay applies in tax law. This principle is complied with by only taking tax-exempt components into account in the progression. The exempt income components are therefore only considered in the tax rate or tariff.

To put it simply, the following example shows the effects:

Taxable income of a taxpayer:	30,000 euros
less tax-free income included therein:	-10,000 Euro
remain taxable:	<b>20,000 euros</b>
Tax rate according to the basic table (9.8 %)	1,960 Euro
Tax rate for 30,000 euros (15.7 %)	(4,710 euros)
Tax due to application of the progression rate to taxable income of EUR 20,000	3,140 Euro
Additional tax due to application of the progression rate	1,180 Euro

This follows: If the progression proviso is applied to the income, the tax rate can increase significantly.

If there is negative income that is subject to the progression proviso, this reduces the tax rate as a result. Losses can therefore lead to a tax rate of zero. This **does not apply to** negative income where there is a ban on loss compensation.

For VAT payers

## Leasing of land with operating facilities

The European Court of Justice has ruled that, in the case of VAT-exempt leases of immovable property, the German VAT Act does not consider the VAT liability of business equipment leased as part of the lease to be compatible with the VAT Directive. Rather, the relevant article of the VAT Directive is to be interpreted as meaning that the business equipment is also let VAT-exempt if the letting of the business equipment is an ancillary service to the main service of the VAT-exempt letting of land.

The Federal Fiscal Court followed this view and thus changed its previous case law. If the letting or leasing of permanently installed operating equipment is an ancillary service to a VAT-exempt letting or leasing of a building as the main service, the co-letting of the operating equipment is also VAT-exempt.

### Note

The change in the BFH's legal opinion has resulted in a need for action.

If the co-letting of operating equipment is now VAT-exempt, input tax can no longer be deducted on input services relating to the operating equipment!

It remains to be seen how the tax authorities and legislators will react to this.

## Inspection fees = taxable service?

Following a decision by the European Court of Justice (Apcoa Parking), the Federal Ministry of Finance added a new paragraph 16b to section 1.3 of the VAT Application Decree in a letter dated December 15, 2023.

Accordingly, inspection fees charged by an entrepreneur entrusted with the operation of private parking spaces from the users of the parking spaces for non-compliance with the general terms and conditions of use of these parking spaces are remuneration for a taxable service provided by the service provider. However, for payments received by



15.12.2023, the tax authorities do not object if they are regarded as genuine compensation for damages.

May the tax office revoke the authorization to tax according to received payments pursuant to § 20 UStG after an external audit revealed that the entrepreneur had issued invoices with VAT statements that had not been paid by invoice recipients for years?

According to a recent ruling by the Federal Fiscal Court, this "tax break", which is contrary to the system, is based on the previous understanding of the German VAT Act.

There is therefore no legal basis for revoking the approval of actual taxation. An abusive arrangement by the taxable persons involved in the exchange of services is also not assumed. According to the Federal Fiscal Court, there may be an incorrect implementation of the application of the VAT System Directive (Art. 167 of the VAT Directive) by the Member State Germany.

#### Procedural law

### A tax audit is also permitted after the death of the business owner

The lawsuit was brought by two sons who had each become co-heirs after their deceased father. The father ran a construction company until his death. The business was not continued by the sons. Nevertheless, the tax office ordered a tax audit for several previous years. The sons believed that a tax audit could only take place as long as the owner himself was able to provide information on the business activities and the business still existed.

A tax audit may be carried out for past tax periods even if the business owner has died and the business is not continued by the heirs. The tax obligations are transferred to the heirs upon the death of the business owner. This also includes tolerating the tax audit. This was decided by the Hessian Tax Court.

## Management of a PC cash register without a fixed allocation criterion - estimation lawful

If individual records are subsequently reorganized by the program after the end-of-day total receipt (Z-receipt) has been created, so that the allocation criterion (data record number) once assigned chronologically is deleted, there is a right to make an estimate on the basis of improper cash management. This was decided by the Lower Saxony Tax Court.

### Civil law

## Car leasing contract concluded without obligation to purchase - consumer has no right of withdrawal

A consumer who concludes a leasing contract for a motor vehicle without an obligation to purchase has no right of withdrawal. On the other hand, a consumer who has concluded a credit agreement to purchase a vehicle without having been properly informed of his rights and obligations can declare his withdrawal at any time as long as



the information provided is not complete and accurate provided that the withdrawal takes place before the contract has been fully performed. This was the ruling of the European Court of Justice, which clarified the rights of consumers in vehicle leasing and loans.

In the case of a leasing contract for a motor vehicle without an obligation to purchase, Union law does not give rise to a right of withdrawal for the consumer. On the other hand, in the case of the conclusion of a credit agreement with a view to the purchase of a vehicle, the consumer may exercise his right of withdrawal at any time without

committing an abuse of rights as long as he has not received complete and accurate information about his rights and obligations and the contract has not yet been fully performed, i.e. as a rule until the last repayment installment is due.

Several consumers had claimed before the Ravensburg Regional Court that they had effectively revoked leasing or loan agreements with banks of car manufacturers (BMW Bank, Volkswagen Bank and Audi Bank). These contracts concerned the leasing of a vehicle without a purchase obligation or the financing of a used car. The Regional Court then referred the matter to the ECJ.

#### **Imprint**

The contents have been compiled with the utmost care, do not claim to be complete and are no substitute for examination and advice in individual cases.

## Tax/social security dates March/April 2024

Tax type		Maturity	
Income tax, church tax, solidarity surcharge		11.03.2024 <sup>1</sup>	10.04.2024 <sup>2</sup>
Income tax, church tax, solidarity surcharge		11.03.2024	Not applicable
Corporation tax, solidarity surcharge		11.03.2024	Not applicable
Value added tax		11.03.2024 <sup>3</sup>	10.04.2024 <sup>4</sup>
End of the grace period for the above types of tax in the event of payment by:	Bank transfer <sup>5</sup>	14.03.2024	15.04.2024
	Check <sup>6</sup>	11.03.2024	10.04.2024
Social insurance <sup>7</sup>		26.03.2024	26.04.2024
Capital gains tax, solidarity surcharge		The capital gains tax and the solidarity surcharge payable on it must be paid to the relevant tax office at the same time as the profit distribution to the shareholder.	

<sup>1</sup> For the past month.

<sup>2</sup> For the past month, for quarterly payers for the past calendar quarter.

<sup>3</sup> For the previous month, for the month before last in the case of a permanent extension.

<sup>4</sup> For the past month, for the penultimate month in the case of a permanent extension, and for the past calendar quarter in the case of quarterly payers (without permanent extension).

<sup>5</sup> Advance VAT returns and income tax returns must generally 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 payment surcharges will be levied if payment is up to three days late. A bank transfer must be made in good time so that the value date on the tax office's account is on the due date.

<sup>6</sup> When paying by check, please note that the payment is only deemed to have been made three days after receipt of the check by the tax office. A direct debit authorization should be issued instead.

<sup>7</sup> Social security contributions are due on the third-last bank working day of the current month. The direct debit procedure is recommended to avoid late payment penalties. All health insurance funds have a standard deadline for submitting contribution statements. These must be received by the respective collection agency no later than two working days before the due date (i.e. on 22.03.2024/24.04.2024, 0 a.m. in each case). Regional peculiarities regarding due dates may need to be taken into account. If payroll accounting is carried out by external contractors, the wage and salary data should be sent to the contractor around 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.