Monthly information

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How do you do? Hope you are doing well.

The Rhineland-Palatinate Fiscal Court ruled that only the term "place of work" and not the term "permanent establishment" has changed with the entry into force of the Act on the Amendment and Simplification of Corporate Taxation and Tax Travel Expenses Law of 20.02.2013. It has thus deviated from the opinion of the Federal Ministry of Finance.

The Federal Fiscal Court had to decide whether there was an abuse of tax planning if a freelancer who determines his profit through an income surplus calculation shifts the special lease payment to a period with temporarily exceptionally high professional use of the car.

In the opinion of the Federal Fiscal Court, a provision for contingent liabilities must be formed for the employer's obligation to grant retirement leave, which is subject to the condition that the employee has been with the company for at least ten years and has reached the age of 60.

On 25.07.2024, the Federal Ministry of Finance published the draft of a law on the further development of tax law and the adjustment of the income tax rate (Tax Further Development Act). This shows that the Second Annual Tax Act 2024 draft bill of 11.07.2024 has been renamed and supplemented with measures from the growth package "Growth Initiative - New Economic Dynamics for Germany".

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

The term "permanent establishment" in current tax travel expense law

The Rhineland-Palatinate Fiscal Court ruled that the entry into force of the Act on the Amendment and Simplification of Corporate Taxation and the Tax Law on Travel Expenses of 20 February 2013 only changed the concept of "place of work" and not the idea of "permanent establishment" (Ref. 1 K 1219/21).

In the dispute case, the plaintiff earned income from self-employment as an IT consultant. He carried out his work four days a week at the registered office of his only client. In his income tax returns for the assessment periods 2016 to 2018, he claimed expenses for the journeys from his home to the customer and back as business expenses according to business travel principles (EUR 0.30/km for the outward and return trip) and not the distance allowance (EUR 0.30/km for the distance between the customer's home and business). The tax office, however, followed the opinion of the Federal Ministry of Finance and took the view that the term "first place of work" in Section 9 of the German Income Tax Act (EStG), which was introduced by the Act on the Amendment and Simplification of Corporate Taxation and Tax Travel Expenses Law of 20.02.2013, is also important for the interpretation of the term "permanent establishment". Therefore, the plaintiff had his "first place of work" at his customer, so only the distance allowance of EUR 0.30 was to be applied.

The plaintiff's appeal against this was unsuccessful before the Rhineland-Palatinate Tax Court. Indeed, the statutory requirements for a "first place of work" within the meaning of Section 9 EStG (new version) are not met in the case in dispute for several reasons. However, the "permanent establishment" is not to be determined with recourse to the term "first place of work" introduced by the new regulation but continues to be determined based on the previous interpretation of the term "permanent establishment" by the case law of the Federal Fiscal Court. Accordingly, in the case in dispute, the registered office of the plaintiff's customer is to be regarded as his place of business, so that he can only claim his travel costs between his home and place of business as business expenses in the amount of the distance allowance. In the opinion of the tax court, the plaintiff's home or home office does not constitute a permanent establishment.

Note

As the Federal Fiscal Court had not yet reached a decision on the issue in dispute, the Rhineland-Palatinate Fiscal Court allowed an appeal to the Federal Fiscal Court. In addition, the tax court deviated from the opinion of the Federal Ministry of Finance in its letter dated December 23, 2014, according to which the definition of the term "permanent establishment" should be based on Section 9 of the German Income Tax Act. The ruling is not final, as the plaintiff has since lodged an appeal with the Federal Fiscal Court (BFH case no.: VIII R 15/24).

Freelancers: Allocation of a special leasing payment to the total annual expenses for business trips

The Federal Fiscal Court had to decide whether there was an abuse of structuring if a freelancer who calculates his profit utilizing an income surplus calculation shifts the special lease payment to a period with temporarily exceptionally high professional use of the car (case no. VIII R 1/21).

To determine the total annual expenses for business journeys as part of a usage contribution, a special leasing payment that is spent on a vehicle that is partially used for business purposes must be allocated to the individual assessment periods during the term of the leasing contract, irrespective of the outflow, as part of a value-based approach. The share of the special leasing payment in the total annual expenses for business trips in a year is to be determined cumulatively from the ratio of the kilometers driven for business purposes to the total kilometers of the respective year and pro rata temporis according to the ratio of the full months in the respective year and the term of the leasing contract. This applies in any case if the special leasing payment serves to reduce the monthly leasing installments during the contract period.

A pro rata deduction of the special leasing payment as a business expense and as income-related expenses is also not precluded by Section 12 no. 1 sentence 2 EStG in the case of mixed causation through income from self-employment, from letting and leasing and through purely private journeys outside the taxable income sphere, as the

special leasing payment is an expense that can be separated based on its professional and private components.

Tax balance sheet provision for retirement leave

According to the Federal Fiscal Court, a provision for contingent liabilities must be formed for the employer's obligation to grant retirement leave (of two days per year of service), which is subject to the condition that the employee has been with the company for at least ten years and has reached the age of 60 (Ref. IV R 22/22).

The tax deductibility of a provision for retirement leave was in dispute. A company granted its older employees an additional annual entitlement to paid time off of two days per year of service in addition to their contractual annual leave. The prerequisite for the entitlement was that the employee had been with the company for more than ten years and had exceeded the age limit of 60. The defendant's tax office rejected the tax-reducing consideration of the provision formed for this purpose. The requirements for a provision for uncertain liabilities were not met.

The Cologne Fiscal Court had already ruled in favor of the company. The judges of the Federal Fiscal Court rejected the tax office's appeal. They saw a surplus of employee benefits in the many years of service to the company and thus an obligation of the company that already existed on the balance sheet date. The fulfillment backlog required for the creation of provisions must also be measured against the economic circumstances. The accounting principles also apply to continuing obligations and thus - as in the case in dispute - to employment relationships. Even if, in the dispute case, not all employees had yet fulfilled both conditions for retirement leave, the future obligation is sufficiently probable.

Note

Provisions for contingent liabilities must be recognized in the commercial balance sheet. The **requirement** under commercial law **to recognize provisions** for liabilities is one of the principles of proper accounting and also applies to the tax balance sheet in accordance with Section 5 (1) sentence 1 EStG.

Tax-free allowances for on-call duty

In a recent ruling, the Federal Fiscal Court decided that the tax exemption of night work bonuses is based on the regular monthly remuneration (basic salary) and not on the on-call pay (case no. VI R 1/22).

This confirmed the opinion of the Lower Saxony Tax Court that the basic wage is calculated following Section 3b (2) sentence 1 EStG and not according to the lower on-call pay. This is based on the employee's regular, contractually agreed wage (basic wage) converted to one hour and not on the lower hourly wage resulting from the conversion of the regular hourly wage to the on-call time remunerated as working time. The employees don't need to be entitled to a basic wage for the additional work in addition to the additional work allowance.

Entertainment of own employees - "business" reason for entertainment expenses?

There is no "business" reason, especially if a company entertains its own employees. Only those hospitality expenses that are business-related but are incurred by the company's own employees are therefore not limited in their deductibility. This was decided by the Berlin-Brandenburg tax court (case no. 6 K 6089/20).

The deduction restriction (Section 4 para. 5 sentence 1 no. 2 EStG) also covers events at which the company's own employees participate alongside third parties (business partners, customers, etc.). § Section 4 para. 5 sentence 1 no. 2 EStG also applies if the catering is integrated into another business activity and is subordinate to it.

For wage tax payers

Neither the amount of wages paid nor the amount of wage tax can be precisely determined - estimation lawful

The Nuremberg Fiscal Court had to decide whether the tax office was entitled to claim a tiler, who could not have generated the turnover with his employees alone to the extent declared, with a liability notice for wage tax and other wage tax deduction amounts (case no. 3 K 1158/22).

If neither the amount of wages paid nor the amount of wage tax to be withheld can be determined because the employer has not kept the legally required records and therefore the tax characteristics of the individual workers cannot be determined, wages and the wage tax due on them must be estimated following Section 162 of the German Fiscal Code.

In the wage-intensive construction industry, the court can generally assess two thirds of the net turnover as the net wage total in the case of illegal employment relationships in the form of undeclared work. The employer is liable for income tax (wage tax) that is reduced due to incorrect information in the payroll account or in the wage tax certificate.

For VAT payers

No taxability of internal services in the case of a tax group

The European Court of Justice has ruled, following a referral from the Federal Fiscal Court, that internal transactions between controlling companies and executive bodies within the meaning of the German VAT Act are not subject to VAT and do not violate EU law.

Note

This decision has eliminated many years of legal uncertainty. It should be noted that supplies/other services within the tax group are not taxable internal transactions even if tax-free output transactions exist.

The decision also clarifies the question of whether proper invoices are required for deliveries/other services within the tax group. This question arose to avoid VAT disadvantages (no input tax credit) in the event of a decision to the contrary (refusal of non-taxability).

Conclusion: For deliveries/other services within the tax group, proper invoices in the VAT sense are not mandatory.

Procedural law

Start of the obligation to notify the use or decommissioning of an electronic recording system

In its letter dated 28.06.2024, the Federal Ministry of Finance lifted the suspended notification obligation regarding the use or decommissioning of an electronic recording system.

What does that mean?

Pursuant to Section 146a (4) of the German Fiscal Code, taxpayers are **obliged to report** the **use or decommissioning of an electronic recording system**. The Federal Ministry of Finance stipulates that for recording systems purchased from 01.07.2025, the required information must be provided within one month of purchase. For systems purchased before 01.07.2025, i.e. all existing systems, the notification must be made by 31.07.2025.

Attention: Decommissioning must also be reported! Before the old system is decommissioned from 01.07.2025, notification of the purchase of the new system must first be given.

What must be reported?

The following information must be submitted electronically to the responsible tax office via the ELSTER program provided for this purpose:

- Name of the taxable person,
- Tax number of the taxpayer,
- Type of certified technical safety device,
- Type of electronic recording system used,
- Number of electronic recording systems used,
- Serial number of the electronic recording system used,
- Date of purchase of the electronic recording system used.
- Date of decommissioning of the electronic recording system used.

Note

In its letter, the Federal Ministry of Finance points out that all electronic recording systems of a permanent establishment must be submitted in one notification. Leased or rented systems must also be reported. Furthermore, there is also a notification obligation for EU taximeters and odometers. If such devices are in use, the BMF letter should be consulted in detail due to the very differentiated design.

Social security law

Benefits on the occasion of company events

If the tax-free allowance of EUR 110 per participant or the number of two eligible events per year is exceeded for company events, the **benefits constitute taxable wages**. The taxable benefits can be taxed by the employer at a flat rate of 25% (§ 40

para. 2 sentence 1 no. 2 EStG). The permissible flat-rate taxation leads to exemption from social security contributions. However, it was unclear by what point in time the employer must have implemented the flat-rate taxation at 25% at the latest in order to justify the exemption from contributions. Accordingly, benefits are only exempt from social security contributions if they are left free of wage tax or taxed at a flat rate with the pay slip for the respective accounting period. As this time limit is almost impossible to implement in practice, the umbrella organizations of the social security system are of the opinion in their meeting of 20 April 2016 (agenda item 5) that the employer must have carried out the flat-rate taxation at 25% by 28/29 February of the following year at the latest and paid the flat-rate taxes to the relevant tax office by this date.

A company that did not apply the lump-sum taxation until March of the following year fought against this and was initially upheld before the Regional Social Court Lower Saxony-Bremen (case no. L 12 BA 3/20). However, an appeal was allowed due to its fundamental importance. The Federal Social Court overturned the preliminary decision of the State Social Court (case no. B 12 BA 3/22 R) and confirmed the opinion of the pension insurance institution conducting the review. According to the Federal Social Court, the decisive factor is that the flat-rate taxation takes place with the pay slip for the respective payroll period. In contrast to wage tax law, a decision must be made for social insurance law with regard to the exemption from contributions in the month.

Note

If the employer wishes to avoid the subsequent claim for social security contributions, the timely flat-rate taxation at 25% must be ensured in future. In this respect, lump-sum taxation on an estimated basis is also an option until the final costs of the company party have been determined.

Legislation

Government draft Tax Development Act (formerly JStG 2024 II) published

On 25.07.2024, the Federal Ministry of Finance published a draft law on the further development of tax law and the adjustment of the income tax rate (Tax Further Development Act - SteFeG).

New regulations were introduced to improve depreciation (measures from the growth initiative):

- Reform of **collective depreciation** by introducing **group or pool depreciation** (increase to EUR 5,000)
- Continuation of **declining balance depreciation for** movable fixed assets acquired or manufactured **in the period from 2025 to 2028** and re-increase to two and a half times the percentage eligible for straight-line depreciation, up to a maximum of 25%

Also new are

- Improving research funding by increasing the assessment basis
- Increase in the immediate supplement in SGB II, SGB XII, SGB XIV, AsylbLG and BKGG from EUR 20 to EUR 25 per month from January 2025
- Adjustments due to ECJ case law on the granting of child benefit and child allowances to EU citizens
- Addition of photovoltaic systems to the list of special-purpose operations as part of the regulations on non-profit status (Section 68 No. 2b AO)

The **reporting obligations for national tax structuring models** are also included.

The following are also included:

- Changes to the non-profit regulations
- the adjustments to the income tax rate
- the transfer of tax classes III and V to the factor method
- the increase in child benefit

The next procedural step, a statement by the Federal Council, could be expected on 27.09.2024.

Tax/social security dates September/October 2024

Tax type		Maturity	
Income tax, church tax, solidarity surcharge		10.09.2024[1]	10.10.2024[2]
Income tax, church tax, solidarity surcharge		10.09.2024	Not applicable
Corporation tax, solidarity surcharge		10.09.2024	Not applicable
Value added tax		10.09.2024[3]	10.10.2024[4]
End of the grace period for the above types of tax in the event of payment by:	Bank transfer[4]	13.09.2024[6]	14.10.2024
	Check[5]	10.09.2024	10.10.2024
Social insurance[7]		26.09.2024	28.10.[8] /29.10.2024
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.	

1 For the past month.

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

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

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

5 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.. 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.

6 If payment is made by check, please note that payment is not deemed to have been made until three days after receipt of the check by the tax office. A direct debit authorization should be issued instead.

7 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. These must be received by the respective collection agency no later than two working days before the due date. 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.

8 Applies to federal states in which Reformation Day is a public holiday.