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Taxes in times of COVID-19

Luther Rechtsanwaltsgesellschaft mbH
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The German Federal Ministry of Finance (BMF) and the supreme tax authorities of the federal states have decided on various measures to provide tax relief for companies affected by the corona crisis. The aim is to improve liquidity in companies that have got into financial difficulties as a result of the corona crisis.

At this point we would like to give you a brief update on the current status of the measures that we currently consider to be particularly noteworthy:

1. Relief for all taxable persons

Corona FAQ of the BMF

First and foremost, those affected are given the option of deferring tax payments, usually without interest, and having advance tax payments reduced. The Federal Ministry of Finance last published **FAQs on these tax relief measures on 30 April 2020** , which provide a quick overview (available in German only).

Request for a flat-rate reduction of advance payments already made for 2019

By **letter from the Federal Ministry of Finance dated 24 April 2020** , taxpayers with profit income and income from leasing (*Vermietung/Verpachtung*), which are negatively affected by the fact that their income is significantly lower than in previous years and they must expect a loss that can be carried back (Section 10d (1) sentence 1 of the German Income Tax Act (*Einkommensteuergesetz*, EStG) for the assessment period 2020, were given the opportunity to apply for a reduction in the fixed advance payments for 2019.

Objective:

This is intended to provide companies with additional liquidity during the crisis by partially paying out a tax refund from the loss carried back from 2020 to 2019 in the context of the 2019 assessment already today by reducing the advance payments for 2019. A deferral solution will ensure correct taxation after completion of the assessments for the years 2019 and 2020.

The inclusion of income from leasing in the scope of the lump-sum loss carryback is consistent, as landlords are burdened by the fact that rents were not paid during the crisis.

Requirements:

- Earning **profit income** or **income from leasing**
- The taxpayer has to be directly and not insignificantly **negatively affected** by the corona crisis (if a reduction for the advance payments for 2020 has already been applied for, it is presumed that the taxpayer is affected).
- **Written application** to the tax office

Amount of the loss carryback determined at a flat rate:

- **15%** of the balance of the relevant income on which the assessment of the advance payment for 2019 was based
- **Upper limit:** 15% of EUR 1,000,000 or, in the case of joint assessment of spouses, of EUR 2,000,000
- In **individual cases** a higher loss to be carried back can be claimed with detailed documentation

Procedure:

- Recalculation of the advance payments for 2019, taking into account the loss carry-back calculated at a flat rate.
- Amendment to the assessment of the 2019 advance payment and - as a general rule - entitlement to reimbursement
- Assessment for 2019:
  - initially only possible without loss carried back from 2020
  - due to reduced advance payments in 2019, tax arrears often arise
  - Deferral of the tax arrears for 2019 attributable to the loss carried back taken into account in the advance payment procedure is possible; application and assurance of the taxpayer that the negative income for 2020 will not be insignificant
  - Only after assessment in 2020 can the final resulting loss carryback with corresponding effects on the 2019 assessment be calculated

Legal assessment:

The lump-sum loss carryback is particularly suitable for small and medium-sized companies and landlords to generate liquidity more quickly. However, it is likely that further fiscal measures will be necessary to counter the effects of the corona crisis which threaten the existence of the company. Further considerations are currently under discussion:

- Flat rate of 30%?
- Loss settlements back over several (five?) years?
- Abolition of minimum taxation for several years or a significant increase in the ceiling?

2. Sales tax and customs duties

With its bill of 6 May 2020, the German Federal Government has introduced a law on the implementation of tax assistance schemes to overcome the corona crisis **("Corona Tax Assistance Act")** . Among other things, this provides for a reduction in the VAT rate from 19 percent to 7 percent for restaurant and catering services provided after 30 June 2020 and before 1 July 2021, with the exception of the turnover generated with beverages.

The same project is also intended to extend the existing transitional provision related to Section 2b of the German VAT Act (*Umsatzsteuergesetz*, UStG) contained in Section 27 (22) UStG until 31 December 2022 due to more urgent work by legal entities under public law, especially municipalities, to deal with the COVID 19 pandemic. In the view of the Federal Government, maintaining the current end of the transitional period would have lasting consequences for intermunicipal cooperation, services of public interest and the performance of the municipalities in particular, but also of other legal entities under public law.

The import of medical equipment is retroactively exempt from customs duties and the German Import Turnover Tax (*Einfuhrumsatzsteuer*) from 30 January 2020 until further notice **(Communication from the Commission of 3 April 2020).**

3. Tax relief in the area of M&A / Corporate

Extended retroactive effect also planned for contributions in kind to a corporation and change of legal form

With the bill of 6 May 2020 (Corona Tax Assistance Act, see above), the Federal Government also intends to temporarily extend the tax retroactive periods in Section 9 sentence 3 and Section 20 (6) sentences 1 and 3 of the German Transformation Tax Act (*Umwandlungssteuergesetz*, UmwStG) in order to harmonise these with the extension of the period of retroactive effect in Section 17 (2) sentence 4 of the German Transformation Act (*Umwandlungsgesetz*, UmwG) by the Act to mitigate the consequences of the COVID-19 pandemic in civil, insolvency and criminal procedural law (*Gesetz zur*

Abmilderung der Folgen der COVID-19-Pandemie im Zivil-, Insolvenz- und Strafverfahrensrecht) of 27 March 2020 (Federal Law Gazette (BGBl.) I page 569).

The bill provides that the retroactive effect in the case of the contribution in kind of operations or shares to a corporation and the change of legal form of a corporation into a partnership will also be extended from the previous 8 to 12 months.

The extension of the retroactive periods under transformation law is limited to application for entry in the register and financial statements in the year 2020.

4. International tax law

Special arrangements for cross-border commuters

For cross-border commuters, who normally commute daily from their place of residence to work in another country and now increasingly work from home, this may have particular tax consequences. In particular if, according to the underlying provisions of the double taxation agreement of the two countries concerned, exceeding a certain number of days on which the actual country of activity is not visited leads to a partial change in the right of taxation.

The Federal Ministry of Finance has therefore agreed special bilateral arrangements in some cases to prevent an unintentional change in the right of taxation. The current status of these agreements can be found on the website of the **Federal Ministry of Finance** .

Operating site risk for home office activities

If employees of companies domiciled in Germany work from home in a foreign country due to the corona crisis, it should be noted that this activity may give rise to an operating site (*Betriebsstätte*) both under foreign national law and under the respective double taxation agreement. This could entail extensive compliance obligations that must be kept in mind. The **OECD** has commented on this issue in a letter dated 3 April 2020.

Tax residence of corporations

A similar problem arises for the tax residency of corporations. If, due to travel restrictions, the decisions of members of the management of a foreign corporation are made in Germany, this may lead to the establishment of an management operating site (*Geschäftsleitungsbetriebsstätte*) in Germany. In addition to extensive compliance requirements, this would also lead to unlimited tax liability of the corporation in Germany. The tax authorities have not yet issued a statement on this.

5. Further notes

Tax measures to promote and support social commitment

In a letter dated **9 April 2020**, the Federal Ministry of Finance published further tax measures that will benefit both citizens and companies that are committed to social cohesion, to halting the spread of the pandemic and to those for whom their everyday life is suddenly associated with unprecedented risks. To this end, further administrative arrangements have been made in the context of donations, operating expenses, income tax (wage donations) and value added tax, as well as clubs and associations.

The planned **Corona Tax Assistance Act** is also intended to exempt up to 80 percent of the difference between the target pay and the actual pay pursuant to Section 106 of Book 3 of the Social Security Code of the employer contributions to short-time working allowance and seasonal short-time working allowance from taxes. The tax exemption is to be limited to allowances paid for wage payment periods beginning after 29 February 2020 and ending before 1 January 2021.

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