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Tax

Topics amongst others:

Businesses: Changes to German travel expenses laws (Reisekostenrecht) 2014

International: Parent-Subsidiary Directive: the European Commission suggests changes to prevent tax evasion

Miscellaneous: German Federal Finance Court: reversing the purchase of real estate (II R 16/12)

Newsletter 1st edition 2014

1. BUSINESSES

1.1. Changes to German travel expenses laws (Reisekostenrecht) 2014
page 3

1.2. The German Federal Ministry of Finance's *(Bundesfinanzministerium)* letter with regard to the reverse charge procedure for deliveries of gas and electricity to resellers
page 3

2. INTERNATIONAL

2.1. Parent-Subsidiary Directive: the European Commission suggests changes to prevent tax evasion
page 4

3. MISCELLANEOUS

3.1. RETT blockers: draft joint decree from the German Federal States on how to apply Sec. 1 (3a) of the German Real Estate Transfer Tax Act (*GrEStG*)
page 5

3.2. German Federal Finance Court: reversing the purchase of real estate (II R 16/12)
page 5

1. Businesses

1.1. Changes to German travel expenses laws (Reisekostenrecht) 2014

In a letter dated 30.09.2013, the German Federal Ministry of Finance *(Bundesfinanzministerium)* has explained in detail the changes to the travel expenses laws, which will come into force in 2014. The objective of the reform is to simplify and standardise the travel expenses laws. To realise these objectives, German legislators have decided to make significant changes to the laws. We would like to inform you about the most significant changes.

Terms which up to now had not been defined by law have now be renamed and included in the laws. The term "regular work place" *(regelmäßige Arbeitsstätte)* has now been replaced with the newly defined term "main work place" *(erste Tätigkeitsstätte)*. Accordingly, travel to the main work place no longer falls under travel expenses and should now be claimed according to the principles of the commuting allowance *(Entfernungspauschale)*.

Travel costs incurred in connection with an external activity *(Auswärtstätigkeit)* can be claimed in the actual amount that they were incurred; it is possible to claim the individual rate per kilometre. Therefore, as of 2014, it is no longer necessary to assess the appropriateness.

Travel within a larger working area *(Einsatzgebiet)*, e.g. journeys made by nursing staff, postal workers or sales representatives, could under the new rules now mean that an employee will not have any "main work place" whatsoever. However, if it has been agreed between the employer and the employee that the employee should initially arrive for work at a specific location and then start working from this location, the journey to this specific location is treated as a journey from home to the main work place. Accordingly, travel to the main location, where the work is to be carried out *(Einsatzort)*, will be claimed under the commuting allowance *(Entfernungspauschale)*. This could result in significant increases when calculating benefits with a monetary value, provided a company car is made available. Only those journeys made within the working area *(Einsatzgebiet)* or the route planning can be submitted according to the travel expenses rules.

The claiming of an allowance for additional board and catering has been simplified; the minimum period of time which must be spent at one place has been reduced. Now a two-part classification will apply instead of the previous distinction between 8, 12 and 24 hours. This applies to both domestic and foreign trips.

With regard to business trips that are due to last for a longer period of time, the interruption of the so-called three month period no longer depends on whether this interruption is based on private or business grounds. As long as the interruption lasts for at least four weeks, a new three month period starts. This could put a significant financial strain on the travel expenses budget in 2014, as through holiday interruptions combined with any other reasons for an interruption, e.g. illness or training, a new period can quickly start which could involve the obligation to pay the travel costs. We would recommend looking at the travel expenses guidelines to be used within the business.

How to claim meals that have been supplied by the employer during external activities *(Auswärtstätigkeit)* has also changed. Meals that are provided by the employer will now be assessed using the official fringe benefit values, according to the German Fringe Benefits Regulations *(Sachbezugsverordnung)*. These meals can be consolidated into an allowance with a tax rate of 25%. This means immunity from taxes in social security contributions. The tax free provision of meals means a reduction in the daily allowance (additional board and catering).

There is a further conceptual definition with regard to accommodation costs. In this regard, only the "necessary additional expenses incurred" can be claimed. What is included in this has now been defined by law.

Changes have also been made to the area of double households. Accommodation costs as well as the size of a flat that may be provided by the employer will no longer be capped according to the size of the flat, but rather by the costs incurred by the flat.

Despite their detail and renewal, the aforesaid new travel expenses laws raise new questions with regard to structuring. We would at any rate recommend re-checking the company-intern travel expenses guidelines.

1.2. The German Federal Ministry of Finance's *(Bundesfinanzministerium)* letter with regard to the reverse charge procedure for deliveries of gas and electricity to resellers

After the transition of the reverse charges for deliveries of gas and electricity using the respective distribution network to domestic resellers, which was realised by the Mutual Assistance Directive Implementation Act *(Amtshilferichtlinie-Umsetzungsgesetz)*, the German Federal Ministry of Finance responded by letter dated 19.09.2013 to the doubts raised and with regard to how the rules, which apply as of 01.09.2013, should be interpreted.

In addition to the new general administration views set out in part 13b, 3a of the VAT Application Decree (*UStAE*) regarding the aforesaid deliveries, the Ministry of Finance also commented on the following issues:

- How to deal with tax group cases in gas and electricity deliveries to resellers;
- The introduction of a reseller certificate to simplify the verification procedures;
- Individual issues regarding balance group accounting, regarding balance group and control area settlements and also regarding deliveries of controlled energy.

The additional interim arrangement put in place by the Federal Ministry of Finance for the period up until 31.12.2013 should help the affected utility companies deal with the relatively complex technical implementation.

2. International

2.1. Parent-Subsidiary Directive: the European Commission suggests changes to prevent tax evasion

As part of a Memorandum dated 25.11.2013, the European Commission has commented on how to curb abusive tax structuring in future cross-border matters within the EU.

As up to now the Parent-Subsidiary Directive has been open to new member states as part of the enlargement of the EU and also, for example, was relaxed in an attempt to reduce the lower limit for benefitting intercompany interests, now in order to close the loopholes, a tightening of the rules is being discussed. In particular, the following suggestions to with regard to general anti-abuse rules (GAARs) have been made by the European Commission:

Hybrid loan mismatch

Specific hybrid financial instruments can be viewed differently in the Member States as either equity or debt. By using the right structure, it is possible for payments made by a subsidiary into such financial instruments in the state in which it is based (source state) to be treated as an interest that is deductible for tax purposes, but that such can be deemed a dividend in the state in which the parent company receiving the payment is based (target state) and, therefore, under the Parent-Subsidiary Directive be exempt from tax. The tax advantage gained from this – which according to the European Commission is not justified – can be impeded by stipulating that the treatment in the source state should also be decisive for the target state. This would mean, for example, that the parent company would not be exempt from tax if the payment in the source state was treated as deductible for tax purposes.

Involving intermediary companies

By using a (possibly otherwise functionless and without any substance) base company, it was until recently possible in certain constellations to forward dividends from one EU state (for example, the state in which an active subsidiary is based) without making deductions at source to a parent company (that has a stake in the intermediary company) outside the EU.

The European Commission's suggestion aims at assessing the intermediary company with regard to its economic (non-fiscal) purpose, its activities and its substance and then deciding whether it should be exempt from tax deductions at source. This way, involving

pure shell corporations for tax reasons could be stopped (similar rules already exist under German tax law, e.g. in the Foreign Tax Act (*AStG*) and in Sec. 50d Income Tax Act (*EStG*)).

According to the European Commission, these suggestions should also make an important contribution to the OECD's action plan on addressing base erosion and profit shifting (BEPS).

3. Miscellaneous

3.1. RETT blockers: draft joint decree from the German Federal States on how to apply Sec. 1 (3a) of the German Real Estate Transfer Tax Act (*GrEStG*)

Through the Mutual Assistance Directive Implementation Act (*Amtshilferichtlinie-Umsetzungsgesetz*) dated 26.06.2013, a new fictitious case has been introduced by Sec. 1 (3a) German Real Estate Transfer Tax Act (*GrEStG*) that, in particular, should make acquisitions with so-called real estate transfer tax blocker structures (RETT blockers) subject to taxation. On 09.10.2013, the highest tax authorities in the Federal States published identical decrees on how to apply Sec. 1 (3a) of the German Real Estate Transfer Tax Act (Federal Tax Gazette (BStBl) I 2013, p. 1364).

According to Sec. 1 (3a) of the German Real Estate Transfer Tax Act, a legal transaction whereby an entity obtains a beneficial interest in the total sum of at least 95% in a company whose assets include domestic real estate can also be deemed a legal transaction within the meaning of Sec. 1 (3) nos 1 to 4 of the German Real Estate Transfer Tax Act. The new rules apply to direct and/or indirect shares in the capital or the assets of a company. In order to calculate the indirect interest in the capital or the assets, the percentages need to be multiplied, i.e. irrespective of the legal form of the company the calculation should cover all the different levels of interest.

Sec. 1 (3a) German Real Estate Transfer Tax Act should only then be applied to acquisitions which are fulfilled after 06.06.2013. If a party is already the beneficial owner of at least 95% of the shares in a company by 06.06.2013, and if these shares are topped up either in part or in whole after 06.06.2013, the decrees make it clear that this is not a case covered by Sec. 1 (3a) German Real Estate Transfer Tax Act. If, however, the already existing beneficial ownership of at least 95% of the shares is transferred to another entity, Sec. 1 (3a) German Real Estate Transfer Tax Act applies. It should, however, be explicitly pointed out that the tax authorities are of the following opinion: if, following an acquisition under to Sec. 1 (3) German Real Estate Transfer Tax Act (consolidation of shares), another legal transaction is carried out as a result of which the entity gains a beneficial interest in the sum of at least 95% for the first time, this transaction is subject to taxation under Sec. 1 (3a) German Real Estate Transfer Tax Act, even if the company's real estate has already been (indirectly) attributed to the purchaser as a result of the preceding acquisition. The provisions on how to attribute real estate set out in Sec. 1 (6) German Real Estate Transfer Tax Act should then be taken into consideration. The prerequisite for attributing real estate under Sec. 1 (6) German Real Estate Transfer Tax Act is, however, that both the real estate and also the purchaser are the same. As the purchaser is not the same when increasing an already existing indirect interest of 95% to a direct interest of 95%, according to the opinion taken by the tax authorities in the decrees, taxes will be collected in their full amount.

The Federal States' decrees clearly reiterate the additional risks involved from a real estate transfer tax law perspective by the new provisions of Sec. 1 (3a) German Real Estate Transfer Tax Act and that with acquisitions, any direct or indirect shares in the capital or the assets of a company have to be taken into consideration. Irrespective of the legal form of the company, all the different levels of interest need to be calculated precisely so that when making structural measures you do not run the risk of incurring real estate transfer taxes.

3.2. German Federal Finance Court: reversing the purchase of real estate (II R 16/12)

In its Judgment dated 05.09.2013, the Federal Finance Court (*Bundesfinanzhof*) has dealt with the prerequisites for recognising the reversal of an acquisition of real estate which is subject to real estate transfer tax.

The basis for the matter in dispute is a provision in Sec. 16 (1) no 1 of the German Real Estate Transfer Tax Act (*GrEStG*) which allows that taxes incurred be annulled if the acquisition of real estate is reversed within two years from the date on which the real estate transfer tax accrues. However, in the case dealt with by the Federal Finance Court the acquisition was not simply reversed but rather it was agreed in the agreement that the sale would be rescinded and at the same time the property would be sold anew to another company that was closely related to the previous buyer.

Neither the tax authorities nor the tax court responsible for the matter deemed this reversal valid, but rather considered that the first buyer was making use of its ownership rights by appointing the second buyer. The Federal Finance Court considered the orders made by the lower court (the finance court) to be insufficient for it to make such a decision. Rather, the Federal Finance Court was of the opinion that it needed to be proven that the first buyer had

an economic interest in the transfer of the property to the second buyer. For instance, this could be proven by the negotiations that took place before the reversal, for example, whether the first buyer within the scope of the reversal of the first agreement had already approached the seller before the second buyer had made a concrete offer. If the first buyer was not concerned with the fate of the sold property, it can be assumed that the reversal of the acquisition that is subject to real estate transfer tax is valid.

This Judgment is important in practice because it provides information about how an acquisition of real estate that is subject to real estate transfer tax can be validly reversed. This way it can, for example, be avoided that the tax authorities come to the conclusion that the first buyer had an economic interest in the transfer to the second buyer. In such a case, the real estate transfer tax might have to be paid twice; once for the transfer from the seller to the first buyer, and a second time for the transfer from the first buyer to the second buyer.

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