ALLEN & OVERY

German lawmaker enacts the 2020 Annual Tax Act

23 December 2020

After the German Bundestag (lower house of German legislature) has passed the 2020 Annual Tax Act (JStG 2020, in the version of the **resolution recommendation of the Finance Committee of the German Bundestag**) on 16 December 2020, the German Bundesrat (upper house of German legislature) also approved the bill in its last session of the year on 18 December 2020. The JStG 2020 considers amendments of various parts of German tax law: on the one hand these changes are to adapt to European law and to react to case law of the German Federal Fiscal Court, and on the other hand to implement fiscal policy decisions. In the following we highlight the main changes per area of tax law. With a few exceptions, the amendments apply from the date following the publication of the JStG 2020 in the Federal Law Gazette.

1. Payroll tax law

Introduction of a home office allowance

One of the most prominent changes of the JStG 2020 is the introduction of the so-called home office allowance (*Homeoffice-Pauschale*), which was repeatedly demanded beforehand by several political parties and associations. This is because a large scale of professional or business activities are performed at home due to the Corona pandemic incurring additional expenses for professional or business reasons. However, these additional expenses were previously only deductible for tax purposes if the workplace qualified as a so-called "home workroom" (*häusliches Arbeitszimmer*). In most cases taxpayers did not meet the specific legal requirements for a deduction of expenses for a home workroom pursuant to Sec. 4 para. 5 sentence 1 no. 6b sentences 2 and 3 German Income Tax Act (EStG) (see also **letter of the German Federal**

Ministry of Finance dated October 6, 2017). For example, they do not have a separate room or this room is not exclusively or almost exclusively used for professional or business purposes. For such cases, the new home office allowance (see Sec. 52 para. 6 sentence 13 EStG) grants an income-related expense deduction for the years of 2020 and 2021 of EUR 5 for each calendar day on which the professional or business activity is performed exclusively in the home office. The home office expenses are limited to EUR 600 per calendar or business year and are not granted in addition to the employee's standard allowance for business-related expenses (*Arbeitnehmerpauschbetrag*) within the meaning of Sec. 9a sentence 1 no. 1 letter a EStG in the amount of EUR 1,000.

Corona measures

The tax exemptions introduced by the Corona Tax Relief Act as of June 19, 2020 for Corona special payments to employees amounting to EUR 1,500 (*Corona-Sonderzahlungen*, Sec. 3 no. 11a EStG) and employer supplements for German short-time working payments (*Arbeitgeberzuschüsse zum Kurzarbeitergeld*, Sec. 3 no. 28a EStG) were previously limited to the period up to December 31, 2020. This period has been extended to June 30, 2021 for the Corona special payments and even to December 31, 2021 for the employer supplements for short-time working payments.

Outplacement consulting services

Until now, it was questionable whether the German tax exemption under Sec. 3 no. 19 EStG for employers' training measures (*Weiterbildungsmaßnahmen des Arbeitgebers*) also covers services in the form of outplacement consulting. According to the briefing note of the Regional Tax Office North Rhine-Westphalia (*Oberfinanzdirektion Nordrhein-Westfalen*) dated August 4, 2020 this interpretation was considered as conceivable by the federal and state fiscal authorities. The German lawmaker is now clarifying the income tax exemption of consulting services for professional reorientation (so-called outplacement or newplacement consulting) for departing employees. In the future, "*consulting services provided by the employer or at the employer's instigation by a third party for professional reorientation upon termination of the employment relationship*" shall be tax exempt for the respective employees.

2. VAT law

The JStG 2020 particularly implements the EU VAT Digital Package, which includes, among others, the extension of the mini-one-stop shop rule to a one-stop shop for e-commerce companies. The package includes other changes of high practical relevance, such as procedural innovations in invoice correction.

Distance sales and one-stop store

The previous country-specific delivery thresholds of EUR 35,000 - EUR 100,000 determined the annual revenue amount in a sales country at which a German mail order company no longer has to report and pay German VAT when shipping to consumers in other EU countries. The German mail order company rather has to report and pay the respective VAT of the country of destination if the delivery thresholds are exceeded. From now on the new version of Sec. 3c of the German VAT Act (UStG) contains a regulation under the new term "distance sales" (*Fernverkauf*), according to which the place of performance for VAT purposes for intra-community distance sales is the place, where the goods are located at the end of the transport. However, this only applies if the supplier exceeds the new EU-uniform, cross-country threshold of EUR 10,000 per year or waives its application.

So far, entrepreneurs could make use of the so-called "Mini-One-Stop-Shop" ("MOSS") procedure for a few, selected transactions. This procedure allowed entrepreneurs to pay the VAT due in other EU countries centrally in their own country of residence and hereby making simultaneous registration in several EU member states unnecessary. The JStG 2020 now provides for an extension to the "one-stop store" taxation procedure (Secs. 18i, 18j and 18k UStG-E). This covers deliveries of goods carried out within the EU by electronic interface, intra-community distance sales (see above) and all consumer services executed at the place of consumption. The new regulations will enter into force on July 1, 2021.

Online marketplaces as tax debtors

In online trading, the lawmaker has so far attempted to counter the enforcement deficit in the collection of VAT from traders located in countries outside the EU by resorting to the liability of marketplace operators under Sec. 25e UStG. In the future, however, online marketplace operators will be liable not only as liable debtors, but also as tax debtors in certain cases. For example, the new Sec. 3 para. 3a UStG-E states that online marketplaces providing the infrastructure between traders and consumers as a so-called "electronic interface" (*elektronische Schnittstelle*) will be treated as if they had purchased the goods themselves from the trader and subsequently sold them to the consumer. The new regulation will also enter into force on July 1, 2021.

Invoice correction: not a retroactive event

Pursuant to Sec. 31 para. 5 German VAT Implementation Regulation entrepreneurs can have formally incorrect incoming invoices subsequently corrected by the supplier if they claim the input tax deduction pursuant to Sec. 15 para. 1 sentence 1 no. 1 UStG. Since the decision of the EU Court of Justice in the case of "Senatex" (ECJ, ruling of 15.9.2016 – C-518/14, BFH/NV 2016, 1870), this is also possible with retroactive effect, hereby saving interest of 6 % per year. Previously, there was disagreement how long affected companies could correct the invoice. This is significant because invoice deficiencies in some cases are only discovered after the advance notification period (*Voranmeldungszeitraum*) of the invoice receipt. While it was undisputed that a correction is generally possible within the procedural limits of the legal force, it was disputed whether an invoice correction constitutes a retroactive event (*rückwirkendes Ereignis*) within the meaning of Sec. 175 para. 1 sentence 1 no. 2 German Fiscal Code (AO). In such case, the statute of limitations for amending the assessment would not begin until the end of the calendar year of the invoice correction (Sec. 175 para.1 sentence 2 AO). However, the previous opinion of the German fiscal authorities that an invoice correction does not constitute a retroactive event within the meaning of Sec. 175 para.1 sentence 1 no. 2 AO and Sec. 233a para. 2a AO (**letter of the Federal Ministry of Finance dated September 18, 2020**) is now legally established in Sec. 14 para.4 sentence 4 UStG-E. An effective invoice correction thus remains permissible with retroactive effect, but only within the limits of the legal force. An accurate invoice receipt control is therefore still crucial.

3. Criminal tax law

Extension of the statute of limitations for prosecution and assessments in particularly serious cases of tax evasion

At the beginning of December 2020, the German government announced its intention to extend the statute of limitations for particularly serious cases of tax evasion due to the cum/ex scandal. It justified this by stating that extensive investigations in the cum/ex scandal are currently still required. According to press reports, public prosecutors' offices in, inter alia, Cologne, Frankfurt am Main and Munich, investigate in the meantime more than 100 cases against around 1,000 suspects and almost 100 German and non-German banks. The current limitation period under Sec. 376 AO of ten years does not provide the investigating authorities with sufficient time for a timely and comprehensive investigation of the respective facts. Therefore, there was a risk that some cum/ex cases becoming time-barred by the end of year 2020. In order to prevent such possible statute of limitations the lawmaker extended the limitation period for prosecution of particularly serious cases of tax evasion from ten to 15 years as set out in Sec. 376 AO.

The extension is particularly relevant because, according to precedents of the Federal Court of Justice (BGH see most recently judgment of April 25, 2017 – 1 StR 606/16, wistra 2017, 400 with further references), particularly serious cases of tax evasion can already exist in case of a tax damage amounting to EUR 50,000 ("on a large scale"). Due to the suspension of expiration provided in Sec. 171 para. 7 AO, the statute of limitations for assessments is also extended to 15 years in case of particularly serious tax evasion. This is also associated with an extended period of observation of 15 years in case of a voluntary self-disclosure to avoid sanctions pursuant to Sec. 371 para. 1 sentence 2 AO.

The extended limitation period shall apply to all acts not yet barred by the statute of limitations resulting in no need for a transitional provision. The lawmaker justifies this by stating that perpetrators of particularly serious tax evasion are not entitled to rely on the previous law with regard to the previous limitation period of ten years. Due to the severity of the crime, the lawmaker is of the opinion that these perpetrators have no legitimate interest in being able to estimate the duration of prosecution even before committing the crime. Therefore, they cannot rely on the fact that they will not be punished after the expiry of the limitation period applicable at the time of the commission of the crime, if the period has not yet expired after the current extension to 15 years.

Abolition of Sec. 375a AO due to Sec. 73e para. 1 sentence 2 StGB-E

Sec. 375a AO, which was introduced by the Second Corona Tax Relief Act with effect from July 1, 2020, has now been abolished by the JStG 2020 after less than six months. Sec. 375a AO ruled that the expiry of a tax claim under Sec. 47 AO due to the statute of limitations does not prevent the criminal confiscation of illegally obtained criminal proceeds under Secs. 73 to 73c of the German Criminal Code (StGB). The provision has been replaced by the criminal law provision of Sec. 73e para. 1 sentence 2 StGB-E, which is largely identical in content.

Sec. 73e para. 1 sentence 2 StGB-E rules that, which means that Sec. 73e para. 1 sentence 1 StGB, does not apply, confiscation of assets obtained in violation of criminal law or the compensation for the value in the case of the statute of limitations is no longer excluded in case of expiry of claims due to the lapse of tax limitation periods. The exception of Sec. 73e para. 1 sentence 1 StGB was introduced by the Criminal Asset Recovery Act as of April 13, 2017, and precludes confiscation insofar as the claim has expired. While the statute of limitations in civil law merely establishes a right to refuse performance (cf. Sec. 214 para. 1 of the German Civil Code), the statute of limitations in tax law (Sec. 47 AO) leads to an expiration of the claim (cf. BGH, decision of October 24, 2019 – 1 StR 173/19, wistra 2020, 107). With regard to time-barred claims, the introduction of Sec. 73e para. 1 sentence 1 StGB resulted in a confiscation loophole. This loophole has now been closed by the lawmaker by introducing Sec. 73e para. 1 sentence 2 StGB-E. As a result, tax benefits obtained in violation of criminal law can therefore be confiscated even if the tax claim is time-barred.

The previous rule of Sec. 375a AO applied to all tax claims not yet time-barred on July 1, 2020 (Art. 97 Sec. 34 Introduction Law to AO). Now in case of particularly serious tax evasion (Sec. 370 para. 3 sentence 2 no. 1 AO), Sec. 73e para. 1 sentence 2 StGB-E shall apply with retroactive effect. In contrast to the legal situation under Sec. 375a AO, the expiration of the tax claim due to the statute of limitations for tax purposes does no longer prevent the possibility of confiscation. The lawmaker allows confiscation irrespective of whether this expiry reason occurred before or after the date on which Sec. 73e para. 1 sentence 2 StGB-E enters into force. Thus, in the case of particularly serious tax evasion due to an "increased interest in confiscation", a possibility of confiscation is created regardless of the statute of limitations for tax purposes in order to safeguard the "general public interest".

4. Investment tax law

Existence of an investment fund

In the area of investment tax law we would like to point out a new regulation relevant for the general scope of application of the Investment Tax Act. Tax authorities' opinion with regard to the old investment tax law, stating that there is no binding effect on BaFin's decision on the existence of an "investment fund" is now incorporated in law (Sec. 1 para. 2 sentence 2 German Investment Tax Act (InvStG)-E). This has been necessary because Sec. 1 para. 2 sentence 1 InvStG, according to its wording, only referred to the supervisory regulations of the German Investment Code for investment management (*Kapitalanlagegesetzbuch*) and thus did not allow any room for interpretation. However, the tax authorities would like to have the possibility to make an interpretation based on the purpose of the "protection of the taxable substrate" and "preventing tax-saving models". Although this is comprehensible in principle, it is likely to lead to considerable legal uncertainty in the future.

Double transparency of umbrella/target fund structures

Also relevant is a legal adjustment in Sec. 37 InvStG. Tax authorities' existing interpretation in case of umbrella/target fund structures, according to which the qualification of income at the level of the target fund is also passed on to the umbrella fund (and from there to the investors, so-called double transparency), is also now enshrined in law. Although this is already "common practice", the adjustment is to be welcomed. However, it should be noted in this respect that allocation amounts of the target fund pursuant to Sec. 37 para. 3 sentence 2 InvStG-E do not retain their status and are lost in the "substance" of the umbrella fund. They therefore lose their privileged status and can only be distributed after all income has been distributed.

Withholding tax deduction

Finally, in connection with the new statutory provisions on investment taxation, attention should also be drawn to Sec. 44 para. 1 sentence 4 no. 5 EStG-E. Here, a previously existing loophole in the collection of tax is closed if the shares in investment funds are not subject to domestic custody. In such cases, the investment fund itself will be obliged to withhold German withholding tax on the corresponding investment income in the future.

5. Real estate transfer tax law

It must be noted that the JStG 2020 does not contain any regulations regarding the recent discussions on combating so-called "share deals". According to reports, it has still not been possible to reach an agreement between the coalition parties on the scope of such a fundamental reform of real estate transfer tax law, in particular, the substitute elements of real estate transfer tax. Nevertheless, two new regulations are of practical relevance:

Late payment surcharge

First, the introduction of Sec. 19 para. 6 German Real Estate Transfer Tax Act (GrEStG-E) adjusts the provisions on the late payment surcharge. The change is due to the fact that the lawmaker no longer accepts that only a lump sum of EUR 25 per month is being assessed (Sec. 152 para. 6 sentence 2 AO) in case of a separate determination of the tax base for Real Estate Transfer Tax (which is, above all, very often the case in the context of the substitute elements of Sec. 1 para. 2a, 3 and 3a GrEStG). Therefore, in the future, the late payment surcharge shall be 0.25 % of the tax to be assessed per month. In addition, the maximum amount of previously EUR 25,000 (Sec. 152 para. 10 AO) shall not apply, which could play an important role in the case of larger transactions.

Brexit regulation

Secondly, a "Brexit rule" has been added to the regulations of Secs. 5 and 6 GrEStG. This stems from the concern that, for example, British limited companies with place of management in Germany will no longer be able to benefit from the foundation theory upon the UK's exit from the EU. Rather, according to the then applicable seat theory under German corporate law, they are deemed to be dissolved if applicable. In order to prevent a violation of the holding periods of Secs. 5 and 6 GrEStG, Sec. 5 para. 3 sentence 2 GrEStG as well as Sec. 6 para. 3 sentence 3 GrEStG were introduced.

Contacts

Dr Gottfried E. Breuninger
Partner
Tel +49 89 71043 3302
gottfried.breuninger@allenovery.com

Dr Michael Ehret
Partner
Tel +49 69 2648 5586
michael.ehret@allenovery.com

Dr Magnus Müller
Partner
Tel +49 89 71043 3312
magnus.mueller@allenovery.com

Dr Heike Weber
Partner
Tel +49 69 2648 5879
heike.weber@allenovery.com

Christina Habermayr
Counsel
Tel +49 89 71043 3312
christina.habermayr@allenovery.com

Dr Dirk Schade
Counsel
Tel +49 89 71043 3302
dirk.schade@allenovery.com

Tim Spranger
Counsel
Tel +49 69 2648 5437
tim.spranger@allenovery.com