Legislative updates and jurisprudence

08 | 2023

For workers

Advertising costs: moving costs because of Setting up a home office

| Relocation costs can be work-related if the move leads to a significant improvement in working conditions. The Hamburg Finance Court also accepted such a relief for the disputed year 2020 if a move takes place in order to set up a study for each spouse in the new apartment so that they can again pursue their respective activities in the home office undisturbed. |

Background: Relocation costs are only deductible as income-related expenses if the change of address is professionally induced. According to the tax authorities, this is the case, for example, if

- the distance between home and place of work is reduced considerably (ie by at least one hour a day),
- the move is carried out in the predominant operational interest of the employer (e.g. when moving into a company apartment),
- the move is due to starting a job for the first time, a change of job or a transfer.

PRACTICAL TIP | If the move is private, a deduction of income-related expenses is not possible. Here, however, a tax reduction according to Section 35a of the Income Tax Act can be considered for the relocation services.

ÿ Facts

Before the start of the corona pandemic, the taxpayers (spouses) carried out their activities on the premises of their employers. Since the beginning of the corona pandemic, they have relocated their activities to work at home, following the instructions or requests of their employers. This

but was only accompanied by considerable impairments due to alternating one's own activities and accepting disruptions.

The couple realized that the corona-related restrictions would not only be short-term. They therefore moved into an apartment with two offices (about 1.6 km from the previous apartment). The tax office did not recognize the relocation costs included in the tax return for 2020 - but wrongly, as the Hamburg Finance Court ruled.

data for the month Sep 2023

ÿ TAX DATES

Due date:

- VAT, LST = 11.9.2023
- Income tax, corporate tax = 11.9.2023

Transfers (period of grace for payment):

- VAT, LST = 14.9.2023
- Income tax, corporate tax = 14.9.2023

check payments:
When paying by check, the check must be submitted to the tax office at least three days before the due date!

ÿ SOCIAL SECURITY CONTRIBUTIONS

Due date of contributions 9/2023 = 27.9.2023

ÿ CONSUMER PRICE INDEX

(change compared to previous year)

6/22	11/22	2/23	5/23*
+8.2%	+11.3%	+9.3%	+6.3%

* 6/23 was not available at the time of going to press.

First of all, the finance court stated that there was no significant shortening of the commute to work, because the home office of the spouses is not to be classified as the first place of work.

In the case at hand, however, the finance court came to the conclusion that the move had led to a significant improvement and facilitation of the taxpayers' working conditions. Because only the move made it possible for the spouses to carry out their non-self-employed work undisturbed.

In view of the different ways in which the couple worked, it was necessary to set up two offices so that the respective activities could be carried out undisturbed. Because they were able to work in separate locations, both of them were able to continue to work to the satisfaction of their employers and did not have to expose themselves to the risk of poorer work results with possible negative consequences for the employment relationship.

Incidentally, in the opinion of the tax court, the new apartment did not differ that much from the previous apartment ment that there was reason to assume that an increase in living comfort was the reason for the move senior

Based on the overall circumstances, it was possible to determine with the necessary certainty in the case of the dispute that the furnishing of the study was the reason for the move.

A private co-arrangement to the effect that the establishment of a self-contained study in the new apartment leads to undisturbed use of the living space otherwise occupied by the work area does not preclude this. Because even if the distance is shortened by more than an hour, the private gain in leisure time by reducing the distance traveled does not conflict with the professional reason.

Note | Since an appeal is pending against the decision of the Hamburg Finance Court, suitable cases can be kept open until the Federal Finance Court makes a decision.

Source | FG Hamburg, judgment of February 23, 2023, Az. 5 K 190/22, Rev. BFH Az. VI R 3/23, at www.iww.de, access no. 235554

For entrepreneurs

Reduced sales tax rate: Rental of residential containers to harvest workers

| The reduced tax rate of 7% applies to the rental of living and sleeping quarters that an entrepreneur has available for the short-term accommodation of strangers according to Section 12 (2) No. 11 Sentence 1 of the Value Added Tax Act (UStG). The Federal Fiscal Court has now decided that the reduced tax rate also applies to the rental of residential containers to seasonal workers (harvest workers). |

ÿ Facts

During the tax periods from 2014 to 2017 (years in dispute), a farmer employed around 100 seasonal harvest workers to whom he rented rooms in residential containers. The duration of the respective lease was three months at most.

The tax office wanted the sales with tax at the standard tax rate (19%) because the accommodations did not have a permanent connection to the property. However, the Baden-Württemberg Finance Court and the Federal Finance Court saw things differently.

According to the current decision of the Federal Fiscal Court, Section 12 (2) No. 11 Sentence 1 UStG not only favors the rental of land and buildings permanently connected to it. Rather, the tax reduction generally includes the rental of living and sleeping quarters by an entrepreneur for the short-term accommodation of strangers – and thus also the rental of mobile living containers to harvest workers.

Source | BFH judgment of November 29, 2022, Az. XI R 13/20, at www.iww.de, access no. 234117

for employer

New contribution rates in long-term care insurance from July 1, 2023

| In 2022, the Federal Constitutional Court ruled that it is incompatible with the Basic Law for parents who are liable to pay social long-term care insurance contributions to be charged the same amount, regardless of the number of children they care for and bring up. As a result, the legislature was asked to make a new regulation. This has now taken effect from July 1, 2023. |

So far, the following contribution rates have applied to long-term care insurance (divided according to employer (AG) and employee (AN)):

- General: 3.05% (AG: 1.525%; AN: 1.525%)
- Childless: 3.40% (AG: 1.525%; AN: 1.875%)
- General Saxony: 3.05% (AG: 1.025%; AN: 2.025%)
- Childless Saxons: 3.40% (AG: 1.025%; AN: 2.375%)

From July 2023, please note the following: A contribution rate of 4% applies to members without children. For members with one child, 3.4% applies. From two children, the contribution is further reduced by 0.25% per child up to the fifth child (max. 1%). However, the deduction only applies until the end of the month in which the respective child has reached the age of 25. That means for members

- without children: 4% (AG: 1.7%; AN: 2.3%)
- with one child: 3.40% (for life: AG: 1.7%; AN: 1.7%)
- with two children: 3.15% (AG: 1.7%; AN: 1.45%)
- with three children: 2.90% (AG: 1.7%; AN: 1.2%)
- with four children: 2.65% (AG: 1.7%; AN: 0.95%)
- from five children: 2.4% (AG: 1.7%; AN: 0.7%)

In Saxony AG pay 1.2%. Subtracting the AG share from the respective total contribution results in the respective AN share, e.g. B. for members without children: 4% (AG: 1.2%; AN: 2.8%).

Source | Law on support and relief in care, BR-Drs. 220/23 (B) of 16.6.2023

For entrepreneurs

Small photovoltaic systems: Employment no longer has to be reported to the tax office

| Operators of small photovoltaic systems (PV systems) no longer have to report their employment to the tax office in accordance with Section 138 Paragraphs 1 and 1b of the Fiscal Code (AO). The Federal Ministry of Finance made this non-objection rule. |

Background: The Annual Tax Act 2022 introduced an income tax exemption for small PV systems (Section 3 No. 72 Income Tax Act (EStG)) and a zero sales tax rate (Section 12 (3) Sales Tax Act (UStG)) for the delivery and installation of certain PV systems. Nevertheless, according to Section 138 Paragraphs 1 and 1b AO, operators of PV systems are generally obliged to report the opening of a commercial operation or a permanent establishment and to submit a questionnaire for tax purposes.

The Federal Ministry of Finance has now decreed that no objection will be raised if operators of PV systems who

- Traders (Section 15 EStG) are, when opening a business that is limited to the operation of PV systems that benefit from Section 3 No. 72 EStG , and
- are entrepreneurs from a sales tax point of view, whose company focuses exclusively on the operation of a PV system i. S. of § 12 Para. 3 No. 1 S. 1 UStG and, if applicable, tax-free rental and leasing according to § 4 No. 12 UStG and who apply the small business regulation according to § 19 UStG,

do not report their employment according to Section 138 Paragraphs 1 and 1b AO.

Note | The regulation applies with immediate effect in all cases in which gainful employment was taken up after January 1st, 2023.

Source | BMF letter of June 12, 2023, Az. IV A 3 - S 0301/19/10007:012, at www.iww.de, access no. 235756

For entrepreneurs

Modernization of partnership law: New GbR regulations will apply from 2024

| Through the law for the modernization of the partnership law (MoPeG) the law of partnerships was reformed. Numerous provisions have been amended or newly added, particularly for civil law partnerships (GbR). The law was announced in the Federal Law Gazette in mid-2021, but it will “only” come into force on January 1, 2024. It should therefore be examined in the coming months whether and to what extent there is a need for action. |

legal capacity

The legal capacity of the GbR, which acts as a foreign company, has been in force since Decision of the Federal Court of Justice of January 29, 2001 (Az. II ZR 331/00) recognized. The revised §§ 705 et seq. of the German Civil Code (BGB) adopt this and therefore assume the legal capacity of the GbR.

NOTE | The unincorporated GbR is to be distinguished from the incorporated GbR. Sections 740 et seq. BGB contain special regulations for these purely internal companies.

Entry in the company register

With the company register, a separate public register was created for GbRs with legal capacity (cf. the provisions of §§ 707 to 707d BGB). This register can

be viewed by anyone. It contains information about the company, the shareholders and the representatives authority of the shareholders.

NOTE | In principle, entry in the register of companies is voluntary. In particular, the entry has nothing to do with the question of legal capacity, i.e. a GbR with legal capacity can exist even if it is not entered in the company register.

However, entry in the register is a prerequisite for the effective execution of certain legal transactions - namely the acquisition of shares in corporations and the acquisition of real estate and intellectual property rights if these are entered in public registers (e.g. trademark or patent rights).

internal relationship

Regarding the internal relationship the GbR has the Cologne Chamber of Industry and Commerce (at www.iww.de/s8214) summarized the following points: How the shareholders organize themselves among themselves can be specified in the articles of association. If there are no rules or no contract, the following principles will apply from 2024:

- The voting power and share of Profit and loss are aligned primarily according to the agreed ownership structure. If no participation ratios have been agreed, they are based on the ratio of the agreed values the posts. If the values of the contributions have not been agreed either, each shareholder has his contribution regardless of the value bears the same voting power and an equal share in the profit and loss (§ 709 Para. 3 BGB).
- All shareholders manage the business together.
- The resignation or termination of a partner does not result more automatically to the dissolution of the GbR.

Note | With all the innovations, however, many principles remain unchanged changed, e.g. B. the partners continue to be jointly and severally liable.

Further note

On its website (at www.iww.de/s8213), the Cologne Chamber of Industry and Commerce provides an overview of the various regulatory areas with further links.

Source | Law on the Modernization of Partnership Law (MoPeG), Federal Law Gazette I 2021, p. 3436; Cologne Chamber of Industry and Commerce “Overview: Modernization of partnership law”, at www.iww.de/s8213

For all taxpayers

Discounting of a purchase price paid in installments: Interest is income from capital assets

| The Cologne Finance Court ruled that in the event that an item belonging to private assets is sold and the purchase price claim is deferred up to a certain point in time – i.e. for more than one year – the purchase price installments made must be divided into a repayment and an interest portion. |

The interest portion is subject to income tax as income from other capital claims in accordance with Section 20 (1) No. 7 of the Income Tax Act (EStG). This also applies if the contracting parties have not agreed on interest or have even expressly excluded it. It is also irrelevant that the advantage of interest-free installment payments is subject to gift tax for the purchaser.

Note | It is questionable whether the finance court will object to a decision of the Federal Finance Court from 2011. Here the Federal Fiscal Court found it seriously doubtful considered whether the interest-free deferral of a claim for the equalization of accrued gains between spouses led to an interest portion being recorded for income tax purposes, since at the same time the requirements for a gift tax free donation were met. It therefore remains to be seen how the Federal Fiscal Court will position itself on this conflict situation between income and gift tax law in the pending appeal proceedings.

Source | FG Köln, judgment of October 27th, 2022, Az. 7 K 2233/20, Rev. BFH Az. VIII R 1/23, at www.iww.de, retrieval no. 235759; BFH judgment of September 12, 2011, Az. VIII B 70/09

For entrepreneurs

No deduction of final foreign permanent establishment losses

| Following the preliminary ruling by the European Court of Justice, the Federal Fiscal Court has now made an important decision for German companies that operate internationally. According to this, domestic companies cannot offset losses from a branch located in another EU country against profits made in Germany to reduce tax if there is no German right to tax foreign income under the agreement to avoid double taxation. This also applies if the losses abroad cannot be used under any circumstances under tax law and are therefore final. |

ÿ Facts

A Germany-based bank had one in the UK in 2004 branch opened. However, after the branch had consistently only made losses, it was closed again in 2007. Since the branch never Ge profit, the bank could compensate for the losses suffered in Great Britain not use it there for tax purposes.

But the losses cannot be used in Germany either. Because according to the agreement to avoid double taxation, permanent establishment income from Great Britain is not subject to German taxation. decide dend is the symmetry thesis according to which the tax under treaty law Foreign income exemption includes both positive and negative income, i.e. losses. A large number of double taxation agreements concluded by Germany contain comparable regulations.

Note | As the Federal Fiscal Court ruled after referral to the European Court of Justice, this exclusion of loss deduction does not violate Union law, even with regard to final losses.

Source | BFH judgment of February 22, 2023, Az. IR 35/22 (IR 32/18), at www.iww.de, access no. 234963; BFH, PM No. 24/23 of April 27, 2023

For workers

Reduced taxation of severance payments only if income is pooled

| According to settled case-law, compensation for the loss of a job can only be taxed at a reduced rate if it leads to an accumulation of income. The Lower Saxony Fiscal Court does not consider this view or handling to be unconstitutional. |

If an employee leaves the employment relationship prematurely at the instigation of the employer and receives a severance payment, this may be wages that are “normally” taxable i. p. of § 19 Income Tax Act (EStG) or tax-privileged compensation according to § 24 No. 1 EStG. The latter can be subject to a reduced tax rate (fifth rule) as extraordinary income (Section 34 EStG).

However, compensation is only preferential if it leads to an accumulation of income within an assessment period.

This requirement is not met if the compensation paid on termination of an employment relationship does not exceed the income lost by the end of the assessment period (end of the year) and the taxpayer does not receive any further income that he would not have received if the employment relationship had continued.

The decisive factor is whether the taxpayer receives more overall in the respective assessment period as a result of the termination of the employment relationsl than he would have received if the employment relationship had continued undisturbed.

Source | FG Lower Saxony, judgment of March 17, 2023, Az. 15 K 19/21, at www.iww.de, retrieval no. 235758