Current legislation and jurisprudence

12 | 2023

For all taxpayers

Important principles for storage and Destruction of business documents

| Especially around the turn of the year, the question regularly arises as to which business documents can be destroyed and which should continue to be retained. Reason enough to take a closer look at the topic of archiving. |

Legal basis and general retention periods

The retention obligations are part of the commercial and tax recording and accounting obligations. Consequently, anyone who is obliged to keep books under tax or commercial law is also obliged to keep them.

Note | The commercial law basis is Section 257 of the Commercial Code (HGB) in conjunction with Section 238 of the HGB. The corresponding tax basis represents in particular Section 147 of the Tax Code (AO).

There is generally no obligation to retain private receipts. However, they are required for income tax assessment as part of the obligation to cooperate.

In addition, two special features must be taken into account in the private sector:

- Two-year retention period for invoices in connection with a property (Section 14b Paragraph 1 Sentence 5 of the Sales Tax Act (UStG)) as well as
- special retention obligations for taxpayers for whom the total of positive income according to Section 2 Paragraph 1 Nos. 4 to 7 of the Income Tax Act (Excess Income Tax Act) amounts to more than EUR 500,000 in the calendar year (Section 147a AO).

It is pleasing that the commercial and tax retention obligations largely correspond. The following list shows the retention periods for important business documents:

- Companies must, for example, store inventories, annual financial statements, management reports, opening balance sheets and accounting documents for ten years. The same applies to all work instructions and organizational documents that make these documents understandable and explain them.

Data for the month January 2024

ÿ TAX DATES

Due date:

- VAT, LSt = January 10, 2024

Transfers (payment grace period):

- VAT, LSt = January 15, 2024

Check payments:
If 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 for contributions 1/2024 = January 29, 2024

ÿ CONSUMER PRICE INDEX

(Change compared to previous year)

10/22	3/23	6/23	10/23
+ 11.6%	+ 7.8%	+ 6.8%	+ 3.0%

• For six years, e.g. b.
Commercial and business letters as well
how documents that are important for taxation (e.g. import and export delivery documents, hourly wage slips) are kept.

NOTE | According to the federal government's plans, the commercial and tax law retention periods for accounting documents are to be shortened from ten to eight years.

Deadline start and possible Extensions of deadlines

The retention period for a financial year only begins at the end of the calendar year in which the last documents were created or the last records (especially bookings) were made (Section 257 Paragraph 5 HGB or Section 147 Paragraph 4 AO) .

ÿ Example

A GmbH has annual financial statements for 2012 prepared in May 2013 and sent to the tax office.

The retention period runs from December 31, 2013. If the retention period is ten years, the retention period ends on December 31, 2023. From January 2024, the relevant documents can in principle be destroyed.

But care is not only required when determining the start of the deadline, but possible extensions must also be kept in mind at the end of the deadline. The following circumstances in particular can lead to an extension of the retention period or a postponement of the destruction of documents:

• external audits that have not yet been completed,
• fixed deadlines that have not yet expired,
• pending criminal tax or fine proceedings,
• Provisional tax assessments in accordance with Section 165 AO or • ongoing applications to the tax office.

Note | For those expected
Expenses for storing business documents are one under both commercial and tax law
Provision for uncertain connections as there is a public law retention obligation for this. The Lower Saxony Regional Finance Directorate comprehensively explained the principles for determining the provision in 2015.

violation of the Retention obligations

As with the violation of recording obligations, the tax office is generally entitled to make an estimate in accordance with Section 162 AO if the retention periods are violated. Exceptions only apply to force majeure such as fire, flood, etc.

Commercial law does not prescribe a specific location for storing business documents. When keeping the trading books and the other required records on data storage media, it must be ensured in particular that the data is available for the duration of the retention period and can be made readable at any time within a reasonable period of time (Section 239 Para. 4 HGB).

Tax law generally requires the documents to be stored in Germany (Section 146 Para. 2 AO). The possible exceptions for storage abroad are regulated in Section 146 Paragraph 2a and Paragraph 2b AO.

NOTE | If documents are to be stored electronically, the principles for the proper management and storage of books, records and documents in electronic form and for data access (GoBD) must be observed. The GoBD are in a letter from
Federal Ministry of Finance from 2019
listed.

Note | Invoices and receipts on thermal paper have the disadvantage that the writing quickly fades and is often no longer readable. Thermal receipts should therefore be copied promptly and filed systematically.

Source | Key points of the federal government for a further bureaucracy relief law, PM of the BMJ from August 30, 2023; OFD Lower Saxony October 5, 2015, Ref. S 2137 - 106 - St 221/St 222; GoBD: BMF letter dated November 28, 2019, Ref. IV A 4 - S 0316/19/10003:001

for employer

Free accommodation and Food: Expected non-cash reference values for 2024

| The benefits in kind for free or reduced-price meals and accommodation are adjusted annually to the development of consumer prices.
According to the present draft - as in previous years, approval by the Federal Council is expected - the benefit in kind for free accommodation should be EUR 278 per month (in 2023 = EUR 265). |

The monthly benefit in kind for meals is expected to increase by EUR 25 to EUR 313 in 2024.

Note | From the monthly
Based on the non-cash benefit value for meals, the following non-cash benefit values for the respective meals result for 2024 (values for 2023 in brackets):

Breakfast:
• monthly: 65 EUR (60 EUR)
• calendar daily: EUR 2.17 (EUR 2.00)

Lunch or dinner:
• monthly: 124 EUR (114 EUR)
• calendar daily: EUR 4.13 (EUR 3.80)

Source | Fourteenth Ordinance amending the Social Security Remuneration Ordinance, BR-Drs. 512/23

For employees

How do employees have to tax profit shares from typical silent partnerships?

| In two appeal proceedings (references VIII R 11/23 and VIII R 12/23), the Federal Finance Court must clarify an important question about silent participations: under what conditions and to what extent are profit shares from employee participations in the form of typically silent ones Participations as income from capital assets and not as income from employment
to qualify? Until a decision is made, suitable cases can be kept open with an objection. |

For entrepreneurs

Losses in the start-up phase: In these cases they must be recognized

| A self-employed management consultant earns income from self-employment. According to the Münster Finance Court, the declared losses within the start-up phase of five years were to be recognized in the event of a dispute because the consultant presented a reliable and fundamentally suitable operating concept in order to generate profits in the future. He was also able to demonstrate that he had taken measures to generate profits. |

Relevance for practice

It is not always clear whether taxpayers are acting with the intention of making a profit, especially when starting an activity. The existence of personal motives for continuing the loss-making activity (saving taxes) or if taxpayers carry out a loss-making activity due to personal inclinations in the area of their lifestyle speak against the assumption of an intention to make a profit.

If there are no typically personal motives, then prima facie evidence supports the assumption of an intention to make a profit if the business management is set up in such a way that the business is suitable and intended to do so in the long term due to its nature and the way it is managed. to work with profit.

In the case of constant losses, one cannot assume that it is a hobby per se. It must be checked whether taxpayers have taken measures to increase the profitability of the business.

NOTE | In principle, losses are recognized during a start-up phase unless it is clear from the outset that no sustainable profits can be achieved. The duration of one Such a start-up phase must be determined depending on the nature of the newly established business, with a period of less than five years only being considered in exceptional cases.

Source | FG Münster, judgment of June 13, 2023, ref. 2 K 310/21 E, at www.iww.de, access no. 236810

For all taxpayers

Extraordinary stress: Accommodation in a nursing home community

| Expenses for accommodation due to illness, care and disability in a nursing home community subject to the respective state law can be taken into account as an extraordinary burden to reduce taxes. This was decided by the Federal Finance Court. |

ÿ Facts

The taxpayer, who is severely disabled (degree of disability 100) and in need of care (care level 4), lived together with other people in need of care in a nursing home community, the construction and maintenance of which was subject to the Housing and Participation Act of the state of North Rhine-Westphalia . There he was around The clock is looked after, cared for and cared for by an outpatient care service and additional staff.

The taxpayer claimed the expenses for accommodation (board and lodging) in the nursing home community as extraordinary expenses in his income tax return. However, the tax office rejected this because these expenses were only deductible in the case of full-time residential care.

The Cologne Finance Court and the Federal Finance Court assessed the expert opinion but different.

The Federal Finance Court clarified that expenses for illness or care-related accommodation in a facility intended for this purpose are generally deductible as an extraordinary burden.

This does not only apply to the costs of accommodation in a home i. S. of § 1 HeimG, but also for the costs of accommodation in a nursing home community, which is the responsibility of the respective state quite falls under. The only decisive factor is that the nursing home community (like the home) primarily serves the purpose of taking in older people or people in need of care or people with disabilities and providing them with living space in which the necessary care, nursing and care services are available be brought.

The deductibility of accommodation costs is not linked to the fact that the taxpayer is provided with fully residential services “from living space and care a single source” (as is the case with home accommodation). It is sufficient if he is a (co-)resident of a nursing home community in addition to being provided living space by external (outpatient)

Service providers (jointly organized) receive care, nursing and care services in these premises.

NOTE | However, there are also illness or care-related costs Costs are only deductible to the extent that they are in addition to the costs of normal paint lifestyle. Therefore, in the event of a dispute, the actual accommodation costs incurred had to be reduced by so-called household savings.

Source | BFH ruling of August 10, 2023, Ref. VI R 40/20, at www.iww.de, access no. 237867, BFH, PM No. 40/23 from October 19, 2023

For all taxpayers

Brochure: Parental leave and leave/part-time employment for family reasons

| The tax administration of North Rhine-Westphalia has published a brochure in which numerous questions about parental allowance, parental leave, leave for family reasons, etc. are answered. The brochure contains 24 pages and can be downloaded at www.iww.de/s6252. |

For all taxpayers

Consideration of previous acquisitions for gift tax: The determined property value is binding

| The Federal Finance Court has decided that a property value determined separately for gift tax purposes is binding for all gift tax assessments in which it is included in the tax assessment basis. This also applies to the consideration of previous acquisitions in accordance with Section 14 Paragraph 1 of the Inheritance Tax and Gift Tax Act (ErbStG), ie for a gift that occurs within ten years of the first gift. |

ÿ Facts

Father (V) gave his son (S) a co-ownership share in a property in 2012. The tax office had determined the property value and used it as a basis for taxation.

However, gift tax was not due because the property value (EUR 87,392) was below the tax allowance for children (EUR 400,000).

In 2017, S received another gift from V kung i. H. of 400,000 EUR. Since several of the same within ten years The financial benefits accruing to the person are to be added together (Section 14 Para. 1 ErbStG), the tax office determined a total amount for both gifts and set the gift tax at around EUR 10,000. Included The tax office took the previous purchase into account at EUR 87,392.

S, on the other hand, said that the value determined at the time was too high and should therefore now be corrected downwards. When making the donation in 2012, he only did not object to the incorrect property value because the gift tax was set at EUR 0 anyway. He was successful with this perspective or

But no justification.

In contrast to the values of other donated items (e.g. money), property values must be determined separately for gift tax purposes in a separate procedure.

Note | The determined value has a binding effect for all gift tax assessments in which it is included in the assessment basis. This also applies to the consideration of a previous acquisition in accordance with Section 14 Paragraph 1 ErbStG.

NOTE | If the taxpayer considers the determined property value to be too high, he or she must immediately object to this determination. If he doesn't do this, the notice will be issued of the determined value, then the taxpayer can no longer successfully claim the inaccuracy in the subsequent gift tax assessments.

Source | BFH judgment of July 26, 2023, Ref. II R 35/21, at www.iww.de, access no. 237663; BFH, PM No. 39/23 from October 12, 2023

For employees

Company car: Without an employment contract regulation, garage costs do not reduce the monetary benefit

| The deduction for wear and tear paid by the employee for his garage does not reduce the monetary benefit from the use of an employer vehicle for off-duty use. According to a decision by the Federal Finance Court, this applies at least if the employee has no legal obligation to the employer to store the vehicle in the garage. |

The decision makes it clear: In order to reduce benefits, it is necessary that costs are “assumed” by the employee towards the employer, which is an employment-related requires a contractual or other labor or service agreement regarding the payment of costs.

Source | BFH ruling of July 4, 2023, reference VIII R 29/20, at www.iww.de, access no. 237109

For entrepreneurs

EU taximeter and Odometer:

A certified technical system will be available by the end of 2025

Safety device not mandatory

| Actually, EU taximeters and odometers must have a certified technical safety device (TSE) from 2024. But now there is a non-complaint regulation that should please affected entrepreneurs. |

Background: Article 2 of the regulation amending the Cash Register Security Ordinance of July 30, 2021 expanded the scope of application of Section 1 of the Cash Register Security Ordinance to include EU taximeters and odometers. This means that these electronic recording systems and the digital records that are kept with them must be protected by a TSE from 2024.

According to the letter from the Federal Ministry of Finance, the technically necessary adjustments and upgrades must be carried out immediately and the legal requirements must be met immediately. However, there will be no objection if these recording systems do not have a TSE by December 31, 2025 at the latest.

Note | The administration has already created a simplification in a letter dated August 30, 2023: According to this, the costs for the subsequent initial equipping of existing EU taximeters or odometers with a TSE and the costs for the initial implementation of the uniform digital interface of an existing The full amount of the electronic recording systems can be deducted immediately as business expenses.

Source | BMF letter dated October 13, 2023, Ref. IV D 2 - S 0319/20/10002:010, at www.iww.de, access no. 237966; BMF letter dated August 30, 2023, Ref. IV D 2 - S 0316-a/19/10006:037