newsletter 11/23

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For income tax payers

Consideration of the energy price lump sum in the height of EUR 300 in the tax return

If pensioners have received the "energy price lump sum for pensioners" in December 2022 from Deutsche Post AG's pension service (statutory pension insurance) or the German Knappschaft-Bahn-See pension insurance or the agricultural pension fund, the amount paid out should not be included in their income tax return for 2022.

If you receive a pension from the German Pension Insurance Knappschaft-Bahn-See (statutory pension insurance) or the landwirtschaftliche Alterskasse (agricultural pension fund) in December 2022, you do not have to declare the amount paid out in your income tax return for 2022. This is because the tax office receives an electronic notification of the payment and will automatically take this flat-rate energy allowance into account for 2022.

If taxpayers have earned income from agriculture and forestry, business operations, self-employment or from active employment as employees in 2022, they are entitled to the "energy price flat rate for gainfully employed persons" in the amount of EUR 300. No entries need to be made in the income tax return. If taxpayers have not yet received an energy price allowance and belong to one of the above-mentioned groups of people, the payment will be made subsequently via the income tax assessment notice from the responsible tax office. The tax office automatically takes the energy price allowance into account.

Note

The entry for the energy price flat rate in the income tax return is only to be made if taxpayers have a short-term or marginal employment relationship (mini-job) or a temporary activity in agriculture and forestry in 2022. In this case, the "Annex Other" must also be submitted.

If, on the other hand, taxpayers only have income from a minor employment relationship (mini-job) in 2022 and have already received the energy price flat rate from their employer, no income tax return is required in this respect.

Uniform examination of the intention to generate a profit for all shares sold

The dispute concerned the valuation of a tax loss generation through the creation of a new share in a corporation by means of a capital increase resolution with a high premium and subsequent resale to the spouse.

The Federal Fiscal Court ruled that capital losses generated in order to achieve tax advantages do not, as a rule, call into question the intention to generate profits, but are to be assessed as to whether legal structuring options (Section 42 AO) have been abused. If shares in a corporation are acquired at different times and at different acquisition costs, an aggregation of the individual shares and the formation of an average acquisition price is not permissible. As a result, the profit or loss from the sale of shares in a corporation must be determined on a pro rata basis.

In connection with income from Section 17 of the German Income Tax Act (EStG), the Federal Fiscal Court states that a taxpayer is generally free to decide whether, when and to whom he sells his shares. This therefore also applies if the sale results in a loss. Taking into account a loss on disposal is not only in line with Sec. 17 EStG, but also complies with the principle of taxation according to ability to pay and is therefore not an abuse of rights from the outset.

The premium paid for a certain share increases the acquisition costs of this share, even if the sum of the nominal amount and the premium exceeds the market value of the share (so-called excess par value issue). This applies in any case to disposals up to 31 July 2019.

Note

However, it should be noted that the sale took place before 31 July 2019. For later disposals, a change in the German Income Tax Act must be observed, according to which premiums from an over-par issue must be distributed equally among all shares held by the taxpayer.

Tax reduction for the use of craftsman services according to § 35a Abs. 3 EStG

The claiming of the tax reduction for craftsman services according to § 35a para. 3 EStG does not require a special right of use of the taxpayer in addition to the (actual) running of a household. Thus, a taxpayer may also run a household in premises provided free of charge. It is harmless if the taxpayer has committed

himself to a third party to bear the expenses for the craftsman's services.

The original view of the lower court that the tax reduction requires that the services are performed for the benefit of an asset that is owned - at least economically - by the taxpayer or to which the taxpayer has a compulsory right of use, was refuted by the ruling of the Federal Fiscal Court. The tax reduction for handicraft services does not require a special right of use by the taxpayer in addition to the actual running of a household. Consequently, the taxpayer may also run a household in premises provided free of charge.

If the conditions for the tax reduction for craftsman's services are otherwise met, this can also be claimed if the taxpayer has made a commitment to a third party to bear the expenses for the craftsman's services. It is also irrelevant if this is done voluntarily, i.e. without a legal obligation, as was the case in the dispute.

The Federal Fiscal Court considered it irrelevant that the craftsman services are also to be recognized if the taxpayer pays for the measure alone, although this benefits the entire house (in the dispute: roof renovation). If the taxpayer is reimbursed for expenses - by whomsoever - this leads to a reduction in the tax reduction. According to the Federal Fiscal Court, any theoretically conceivable claims for compensation are not to be offset against the payments made until they have been satisfied.

For wage tax payers

Compensation for dismissal: Accrual of wages in the case of credit balances - Liability for wage tax

The Federal Fiscal Court commented on whether severance payments made as compensation for the loss of income from employment can be effectively allocated to time accounts (credit balances) or transferred to the German Pension Insurance Fund (Deutsche Rentenversicherung - DRV) free of tax in order to avoid an inflow to the employee. The employee shall not receive wages (redundancy compensation) even if the agreement on the allocation to a credit balance of the employee or the transfer of the credit balance to the DRV Bund in accordance with the agreement should be invalid under social security law, insofar as all parties involved nevertheless allow the economic result to occur and exist.

In the case in dispute, it can be ruled out that the severance payments, insofar as they were to be allocated to the respective long-term time accounts, accrued to the employees in the disputed period. Consequently, the wage tax did not accrue and (accessory) liability of the plaintiff cannot be considered. This result is confirmed by the fact that the DRV Bund has to withhold and pay the wage tax for each partial payment from a credit balance.

Corporate tax

No vGA in the case of early redemption of a reinsured pension commitment to a controlling shareholder-managing director

The Münster Fiscal Court commented on whether the early redemption of a reinsured pension commitment to a to a controlling shareholder-managing director, which is agreed due to the crisis of the GmbH, leads to a hidden profit distribution (vGA).

From a tax law point of view, it is not objectionable if a pension commitment is not made dependent on the beneficiary's termination of employment as a managing director upon the occurrence of the pension event. In such a case, however, a prudent and conscientious managing director would, in order to avoid a vGA, demand that the income from the continuing activity as managing director be offset against the pension benefits, or would postpone the agreed start of the pension due date until the beneficiary has finally terminated his or her function as managing director. The actual purpose of the company pension scheme

The actual purpose of the company pension scheme for the period of continued employment would be missed if a current old-age pension were to be paid and at the same time the employment relationship were to be continued in the previous manner in return for a current salary.

According to these standards, the court is convinced that the payment made by the GmbH to the plaintiff in settlement of the pension commitment in favor of the plaintiff was not for company reasons but for business reasons and therefore did not constitute a vGA.

For VAT payers

"Need to know" of foreign VAT-scam

According to a ruling by the Federal Fiscal Court, the measures that may reasonably be required of a taxable person in order to prevent his own involvement in third-party VAT fraud depend essentially on the cir-

cumstances in each case, which must be determined in accordance with the rules of evidence under national law, which must not impair the effectiveness of Union law.

A taxable person may not generally be required to verify whether the issuer of an invoice for the supply of goods for which the right to deduct VAT is claimed had the goods in question at its disposal, was able to supply them and fulfilled its obligations with regard to the declaration and payment of VAT. However, if there are indications of irregularities or VAT fraud, the taxable person may be obliged to obtain information on another trader from whom he intends to purchase goods or services in order to satisfy himself of the trader's reliability.

Note

For the purchaser to be able to deduct input tax, there is no general requirement that the VAT due has actually been paid by the previous entrepreneur.

However, the purchaser's input tax deduction may be denied if he knew or should have known that the supplier or another party was involved at a previous or subsequent stage of the transaction in an act of VAT evasion or in obtaining an unjustified input tax deduction within the meaning of Section 370 of the German Fiscal Code (AO) or in damage to the VAT revenue within the meaning of Sections 26b and 26c of the German Turnover Tax Act (Section 25f of the Turnover Tax Act).

Legislation

Demand for permanently reduced VAT in the catering industry

A permanent reduced VAT rate of seven percent on the consumption of food in restaurants failed to win a majority in the Bundestag on 21 September 2023.

Mecklenburg-Western Pomerania and Saxony-Anhalt are calling for a permanent reduced VAT rate of seven percent to be maintained in the restaurant sector. On 29 September 2023, a corresponding initiative was presented in the Bundesrat and referred to the specialist committees. On 9 October 2023, the specialist committees of the Bundesrat - the Finance Committee as the lead committee and the Economics Committee and the Committee for Labor, Integration and Social Policy as co-counsel - called for the inclusion of the deferral of the reduced VAT rate in the catering trade beyond 31 December 2023 in the Growth Opportunities Act as part of their opinion on the Growth Opportunities Act.

Federal Cabinet decides on social insurance calculation sizes 2024

On 11 October 2023, the Federal Cabinet adopted the Ordinance on Social Security Calculation Parameters 2024. Before it is promulgated in the Federal Law Gazette, the Bundesrat must still approve it.

The **reference value** will rise in 2024, when it will be used to determine the **minimum contribution bases** for voluntary members of the statutory health insurance scheme and to calculate contributions for self-employed persons subject to compulsory insurance in the statutory pension scheme. In 2024, the reference amount will rise to **EUR 3,535/month** (2023: EUR 3,395/month); **the reference amount (East)** to **EUR 3,465/month** (2023: EUR 3,290/month).

The **income threshold** for **general pension insurance** increases to EUR **7,550/month** (2023: EUR 7,300/month) and the **income threshold (East)** to **EUR 7,450/month** (2023: EUR 7,100/month).

The nationally uniform compulsory insurance limit for statutory health insurance (**annual earnings limit**) is **EUR 69,300** in 2024 (2023: EUR 66,600). The income **threshold for statutory health insurance**, which is also uniform throughout Germany, will rise to **EUR 62,100** per year (2023: EUR 59,850) or EUR 5,175 per month (2023: EUR 4,987.50).

Energy efficiency law passed

With the Energy Efficiency Act (EnEfG) passed by the German Bundestag on 21 September 2023, companies with a large energy consumption (more than 7.5 GWh on average) will also be required to introduce energy or environmental management systems, and **companies** with a total final energy consumption of 2.5 GWh or more are to record and publish economic energy efficiency measures in implementation plans. However, the companies themselves decide on the implementation of suitable efficiency measures.

Energy efficiency standards apply to **data centers**. Waste heat must also be used in the future, as this is where potential for greater energy efficiency lies dormant. In addition, all operators of large data centers will have to use electricity from renewable sources in the future, enter information on their energy consumption in a public register, and inform their customers about their specific energy consumption.

The law does not require approval. The Federal Council approved the law on 20 October 2023. It will now be forwarded to the Federal President for signature via the Federal Government.

Building energy law approved

The so-called Heating Act, which the Bundestag passed on 8 September 2023, cleared the final parliamentary hurdle in the Bundesrat on 29 September 2023. This automatically approves the law, which did not require the consent of the states. It will now be forwarded via the federal government to the Federal President for signature and can then be promulgated in the Federal Law Gazette. It is expected to come into force in large parts on 1 January 2024.

With the current revision, the Building Energy Act (GEG) will also be interlocked with a new law on “Heat Planning and Decarbonization of Heat Networks” (WPG). The new version of the GEG stipulates that from 2024, all newly installed heating systems must be powered by at least 65 percent renewable energies.

Employment law

Reference may not be worsened because of change requests

If an employer worsens a reference because the employee has requested changes to it, it violates the prohibition on disciplinary action. According to the Federal Labor Court, an employer may not make the third version of the reference worse and omit the thank-you formula previously included in it simply because the employee had already requested changes to it twice before. Admittedly there is in principle no requirement on a thank-you formula at the end.

However, to delete it because of the permissible exercise of statutory rights would violate the prohibition of regulation under Section 612a of the German Civil Code (BGB), which continues to apply even after termination of the employment relationship. Therefore, there is a claim to the thank-you formula.

Miscellaneous

Obligation for (almost) all companies to be entered in the transparency register

Almost all companies are required to register and report to the transparency register as of 1 August 2021. If entries have not yet been made, they should be made urgently. Otherwise, fines may be imposed. The Federal Ministry of Finance has again drawn attention to this in a letter to associations.

All legal entities under private law (e.g. AG, GmbH and Entrepreneurial company (limited liability)) and registered partnerships (e.g. OHG, KG, PartG) as well as non-incorporated foundations, trusts and similar associations are affected.

Sole proprietorships, registered traders (e. K.) and civil law partnerships (GbR) are currently not affected, although the latter will become partially subject to registration as a result of the reform of the law on partnerships (MoPeG) from 1 January 2024. With the MoPeG, GbRs can register in a new company register to be created. This means that the GbR in the form of the so-called “eGbR” will belong to the registered partnerships and as such will also have to be entered in the transparency register.

The transitional periods have now expired, this means that all those affected must take action, regardless of whether the information is already contained in other public registers (e.g. commercial, cooperative or partnership registers).

Dates Taxes/Social Insurance

November/December 2023

Tax type		Due Date	
Wage tax, church tax, solidarity surcharge		10 November 2023[1]	11 December 2023[1]
Income tax, church tax, solidarity surcharge		Not applicable	11 December 2023
Corporate tax, solidarity surcharge		Not applicable	11 December 2023
Value added tax		10 November 2023[2]	11 December 2023
End of grace period of above tax types when paid by:	Bank transfer[4]	13 November 2023	14 December 2023
	Check[5]	10 November 2023	112023
Trade tax		15 November 2023	Not applicable
Property tax		15 November 2023	Not applicable
End of grace period of above tax types when paid by:	Bank transfer[4]	20 November 2023	Not applicable
	Check[5]	15 November 2023	Not applicable
Social insurance[6]		28 November 2023	27.12.2023
Capital gains tax, solidarity surcharge		The capital gains tax and the solidarity surcharge on it must be paid to the responsible tax office at the same time as a profit distribution is made to the shareholder.	

1 For the past month.

2 For the past month, in the case of a permanent extension for the month before last, for quarterly payers with a permanent extension for the past calendar quarter.

3 For the month that has elapsed, in the case of a permanent extension for the month before last.

4 As a rule, advance VAT returns and wage tax returns must be submitted (electronically) by the 10th of the month following the filing period. If the 10th falls on a Saturday, Sunday or public holiday, the next working day shall be the deadline. No late fees will be charged if payment is up to three days late. A remittance must be made early enough so that the value date on the tax office's account is the same as the due date.

5 If payment is made by check, it should be noted that payment is not deemed to have been made until three days after the check has been received by the tax office. A direct debit authorization should be issued instead.

6 Social security contributions are uniformly due on the third last bank working day of the current month. In order to avoid late payment surcharges, the direct debit procedure is recommended. All health insurance funds have a uniform deadline for the submission of contribution statements. These must be received by the respective collection agency no later than two working days before the due date (i.e. on 24.11.2023/21.12.2023, in each case at midnight). Regional peculiarities with regard to the due dates may have to be taken into account. If payroll accounting is performed by external agents, the payroll data should be transmitted to the agent approximately ten days before the due date. This applies in particular if the due date falls on a Monday or on a day after a public holiday.

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