Income tax

Renting and leasing - attribution of income in the case of quota usufruct of a partnership share

By granting the usufruct of a share in a partnership managing assets, the usufructuary - instead of the partner - generates the income from renting and leasing attributable to the share, if and to the extent that he is fundamentally in a position to participate in the company's underlying transactions on the basis of the voting and management rights contractually granted to him.

According to a ruling of the German Federal Fiscal Court, the same applies to the quota usufruct of a company share. The quota usufructuary only generates the income from renting and leasing attributable to the share if the contractual provisions on the appointment of the quota usufruct ensure that the shareholder cannot make decisions - including those relating to the foundations of the company - alone and/or against the will of the quota usufructuary.

Note

According to the Federal Fiscal Court, contractual provisions are probably harmful which, beyond the scope of application of Section 1071 (2) of the German Civil Code (BGB), grant the shareholder the right to participate without having to take the usufructuary into account.

Taxation of stock options from foreign employer in case of change of residence

If stock options are granted to an employee within the scope of his employment, the resulting non-cash benefits will only accrue at the time the option is exercised. The non-cash benefits from the exercise of the stock options are granted on a time-period basis - irrespective of taxation at the time the option is exercised - and are therefore to be allocated proportionately to the earning period. According to the inducement principle, the period between the granting of the stock options and their first exercisability is relevant. However, a conclusive assessment can only be made on the basis of the specific agreements made when the stock options were granted.

The stock options can only be finally assessed on the basis of the specific agreements made when the stock options were granted and the other circumstances of the individual case.

According to the Federal Fiscal Court (Bundesfinanzhof), in cross-border situations, any exemption of income under treaty law is based on the activity in the vesting period. If the double taxation agreement with the USA (DBA-USA 1989/2008) is linked to a “person resident in a contracting state,” only the residence at the time of the inflow of income is decisive.

Accrual of bonus interest from a building savings contract if the interest is only shown in the books on the bonus account

Bonus interest from a home savings contract does not accrue to a taxpayer as soon as the interest is recorded annually in a bonus account maintained by the home savings bank, if an entitlement to the bonus interest only arises after a waiver of the home savings loan, the bonus interest only becomes due when the home savings credit is paid out, and it can only be disposed of in connection with the home savings credit. This was the decision of the Federal Fiscal Court.

Accordingly, the Fiscal Court correctly ruled that the tax office was entitled to subject the bonus interest to taxation in full in the year in dispute. In the case in dispute, the bonus interest credited by the building society was an increase in the credit interest granted to the plaintiff for the transfer of the building society credit. The bonus interest therefore constituted - just like the credit interest - remuneration for the transfer of capital assets for use. The situation is not different because, in the case of a building savings contract, savings are generally only a transitory stage on the way to obtaining a building savings loan. This does not exclude the possibility that, in individual cases, the purpose of saving may be a (co-)determining factor for the conclusion of a building saving contract. This applies in any case if the expectation of a return from the credit balance is in the foreground. It is sufficient if the intention to generate income from capital assets is only pursued as a secondary purpose.

Sale of a department store after facade renovation not commercial property trading

In the absence of a sustainable activity, commercial real estate trading does not exist if only a property (in

this case a retail department store) is acquired, the facade is renovated and it is subsequently sold. According to a ruling by the Hamburg Fiscal Court, this applies in any case if the taxpayer does not develop any activities in the context of the facade renovation that go beyond what is required for the construction of any building in terms of scope and weight.

Note

For an assessment of the correct distinction between private asset management and commercial real estate trading, please refer to the Income Tax Notes 2020, Annex 17 (Federal Ministry of Finance, 26 March 2004).

Calculation of depreciation: remaining useful life of a rental object according to the Real Estate Value Ordinance (Immobilienwertverordnung)

Valuation reports obtained by a taxpayer in which the remaining useful lives of rental properties are calculated in accordance with the German Real Estate Value Ordinance (ImmoWertV) can be used as a basis for determining depreciation for wear and tear (AfA). This was the decision of the Münster Fiscal Court.

According to the principles of the ruling of the Federal Fiscal Court, taxpayers have the right to choose between being satisfied with the typified depreciation rates or claiming and demonstrating a shorter useful life. It is not necessary to be certain of a shorter actual useful life. Rather, at most the highest possible probability can be required, so that an estimate by the taxpayer is only to be rejected if it clearly lies outside the reasonable range of estimation. In this case, the procedure for determining the real value of a building in accordance with the

ImmoWertV can be applied, even if this represents a model calculation that is not primarily aimed at determining the actual useful life in accordance with the Income Tax Act. Based on these principles, residual useful lives determined based on submitted expert opinions are therefore not objectionable.

Silent partnership interest in the employer's company - income from capital assets or from non-self-employment?

A silent partner who participates in the profits and losses of the company is not to be regarded as a co-entrepreneur if he has no share in the value of the company or in the increase in the hidden reserves of the business assets, including goodwill, and if he also has no voting rights or rights of objection beyond the right to inspect the annual financial statements, including the audit reports of the auditor. This was the decision of the Baden-Württemberg Tax Court.

The fact that the employee has no contractual entitlement to the silent partnership speaks in favor of a special legal relationship that exists independently of the employment relationship. The possibility of making the silent partnership contribution by means of retained earnings is a customary way of contributing.

The fact that the employee's profit share from the silent partnership is not limited to a certain - absolute and appropriate - percentage of the contribution cannot be construed as an inducement to the silent partnership by the employment relationship.

The profit shares from the silent partnership in the GmbH do not lead to income from employment for the plaintiff, but to income from capital assets.

VAT

Construction of a photovoltaic system: tax accrual and adjustment in the event of subsequent receipt of the payment

The Federal Fiscal Court had to clarify, among other things, the question of whether the entrepreneur is entitled to adjust the tax calculated according to agreed charges already for the taxable period in which the tax arises, with regard to a due date agreement according to which the agreed remuneration is only due for payment to the extent that it can be settled from the current income of the customer's electricity feed-in.

The tax also arises with the performance of the service, without a tax adjustment, if the contractor for the construction of a photovoltaic system agrees with its operator that the remuneration for this is owed only to the extent that it can be settled by income from the feed-in of electricity. In this case, the plaintiff is not entitled to adjust the tax for the respective partial performance to the extent of the respective difference between the agreed remuneration and the remuneration received.

Reduced VAT on the rental of non-permanent living containers to employees

The German Federal Fiscal Court has clarified that not only the renting of land and buildings permanently connected to it is favored under the VAT Act, but in general the renting of living and sleeping quarters by an entrepreneur for the short-term accommodation of strangers and thus also the renting of living containers to harvest workers.

This is also in line with EU law. The list of supplies of goods and services to which reduced VAT rates may be applied includes accommodation in hotels and similar establishments, including accommodation in vacation accommodation, and the rental of camping sites and sites for the parking of caravans. “Lodging in vacation accommodations” also includes the rental of tents, caravans or mobile homes set up in campgrounds and used as lodging.

Use of a newly acquired passenger car partly for taxable, partly for tax-exempt transactions - input tax allocation not according to sales key.

If, after acquisition, a passenger car is used partly to generate taxable and partly to generate tax-exempt sales, the input tax allocation for the passenger car is to be made on the basis of the mileage of the passenger car. According to the Tax Court of Baden-Württemberg, an apportionment in the ratio of the mileage attributable to the taxable and tax-exempt sales leads to a more precise economic assessment.

If an entrepreneur acquired the new passenger car shortly before the end of the year (in this case: November) and had already previously used another “functionally identical” passenger car for the same sales in the year of acquisition of the passenger car, the input tax apportionment must be based on the actual use of both the old and the new passenger car in the entire calendar year and thus on the total mileage in the entire calendar year.

If the newly acquired passenger car is used for taxable or tax-exempt transactions from the time of acquisition until the end of the year to a different extent than determined in the input tax apportionment at the time of purchase on the basis of the total mileage for the calendar year, an input tax adjustment must be made in this respect. In any case, where an already existing asset is replaced by an asset with the same function, the application of the exclusion of input tax deduction and the adjustment of the input tax deduction may occur in parallel.

Corporate tax

Actual implementation of a profit and loss transfer agreement - recognition of a tax group for corporate income tax purposes

If the profit and loss transfer agreement is not executed during the minimum term of five years, this not only leads to an interruption of the consolidated tax group under corporate income tax law for individual assessment periods, but also to an overall (retroactive) non-recognition of the consolidated tax group under corporate income tax law.

According to a ruling of the Federal Fiscal Court, the actual implementation of the profit and loss transfer and control agreement requires that it be executed in accordance with the contractual agreements. Among other things, this means that the profits determined in accordance with generally accepted accounting principles are actually transferred to the controlling company by way of payment or offsetting. “Offsetting” in this context is to be understood as meaning that it must be an offsetting equivalent to an actual payment; the mere posting of the receivable without a settlement effect, on the other hand, is not sufficient.

Tax contribution account: Shareholder has no right of challenge

The Corporate Income Tax Act stipulates that the existence of the tax contribution account must be established by means of a special notice. In particular, the contributions made by the shareholder to “his” corporation are to be recorded in the account. If such contributions are later repaid to the shareholder from the contribution account, then the shareholder does not have to pay tax on this so-called return of contributions. Although the notice thus essentially has significance for the taxation of the shareholder, the notice is directed exclusively at the corporation. The Federal Fiscal Court has confirmed this view. In principle, an assessment can only be challenged by the addressees. In the case of the notice under the German Corporate Income Tax Act, this is the corporation, and it alone can therefore lodge an objection and take legal action. The shareholder of the corporation is not the addressee, but as a third party is only indirectly affected by the notice. The shareholder's own right of appeal (so-called third-party right of appeal) is also not to be recognized as an exception. On the one hand, there is no gap in legal protection, as the corporation has not can assert errors in the assessment in appeal

proceedings. On the other hand, the consequence of such a right is that the decision can still be challenged by the shareholder after many years and that there is no lasting legal peace. The denial of the shareholder's own right of appeal is also compatible with the Basic Law's guarantee of legal protection (Art. 19 (4) GG).

Miscellaneous

Change in payroll tax deduction: Employees can expect more net pay

According to the Federal Ministry of Finance, as of 1 April 2023, the amended program schedules for payroll tax deduction 2023 will be applied. This will take into account "the increase in the employee lump sum to EUR 1,230 euros and the relief amount for single parents to EUR 4,260 by the Annual Tax Act 2022." For salaried employees or civil servants, among others, this means that they can also expect a higher net salary in their account as a result of the higher tax allowances.

Wage increases for employees in various sectors

Employees covered by collective agreements in the main construction industry - building, civil engineering, or road construction - can look forward to higher wages from 1 April 2023. In the west by 2 percent and in the east by 2.7 percent. In May, a one-off payment of EUR 450 is also due.

The industry-related minimum wage for painters and varnishers will rise from EUR 13.80 to EUR 14.50 from 1 April 2023. For helpers, the minimum wage will then be EUR 12.50; this is an increase of EUR 1.10euros per hour.

The collectively agreed minimum wage for temporary workers will be at least EUR 13.00 per hour from 1 April 2023. The hourly rates of pay are based on the respective pay group. IG Metall provides an overview of all pay groups.

German government agrees on new funding concept for renewable heating

On 19 April 2023, the German government agreed on a new funding concept for renewable heating. The bill to amend the Building Energy Act will enshrine the mandatory switch to renewable energies for heating in law. In concrete terms, this means that from 1 April 2024, as far as possible, every newly installed heating system must be powered by at least 65% renewable energies. Consequently, the subsidy will also be adjusted as a result.

The Building Energy Act will now be forwarded to the Bundestag and Bundesrat.

Caution with renovation measures

The legislator is attempting to promote energy-efficient building refurbishment as an important component of the energy turnaround by means of statutory requirements. In doing so, one aspect has obviously been overlooked that can severely hamper these efforts. According to the expert company Richardson in Witten, the issue of asbestos will become dramatically more important in the near future. It is not known how many homes and buildings built before the ban in 1993 contain asbestos. However, the proportion is likely to be considerable.

Since asbestos fibers can be released during energy-related renovation work, the statutory protective measures take effect, which can lead to considerable cost increases.

Note

Before an energetic building refurbishment is realized, an asbestos test should be commissioned in advance by an expert for the affected objects. This is the only way to avoid incalculable risks.

Dates Taxes/Social Security

May/June 2023

Tax type		Due date	
Wage tax, church tax, solidarity surcharge		10 May 2023[1]	12 June 2023[1]
Income tax, church tax, solidarity surcharge		not applicable	12 June 2023
Corporate tax, solidarity surcharge		not applicable	12 June 2023
Value added tax		10 May 2023[2]	12 June 2023[3]
End of grace period of above tax types when paid by:	transfer[4]	15 May 2023	15 June 2023
	Check[5]	10 May 2023	12 June 2023
Trade tax		15 May 2023	not applicable
Property tax		15 May 2023	not applicable
End of grace period of above tax types when paid by:	transfer[4]	19 May 2023	not applicable
	Check[5]	15 May 2023	not applicable
Social insurance[6]		26 May 2023	28 June 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 Advance VAT returns and wage tax returns must generally 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 considered to be made until three days after the check is received by the IRS. A direct debit authorization should be issued instead.

6 Social security contributions are uniformly due on the third last banking day of the current month. In order to avoid late payment penalties, it is recommended to use the direct debit procedure. 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 24.05.2023/26.06.2023, 0:00 hours in each case). Regional peculiarities about the due dates may have to be taken into account. If payroll accounting is performed by an external agent, 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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