newsletter 03/23

Emergency aid

Tax issues around the December emergency aid

The emergency aid was passed by the Federal Council on 14 November 2022 and came into force on 19 November 2022. According to its abbreviation "EWSG" (*Erdgas-Wärme-Soforthilfegesetz*), it concerns state measures against the considerably increased energy costs for end consumers for natural gas and district heating. It is in addition to the energy price flat rate of one-time EUR 300 to reduce electricity price increases.

Private households as well as commercial and industrial consumers with an annual gas consumption of up to 1.5 million kWh are eligible. The relief consisted of the state taking over the gas instalment payment for the month of December 2022. For district heating, a flat rate payment was made as a subsidy, which was based on the budget billing payment for September 2022. These benefits paid by the state are taxable for certain recipients. The Annual Tax Act 2022 contains a section specifically created for this purpose (XVI. Taxation of the gas/heat price brake) with four standards (§§ 123 - 126 EStG).

Firstly, it is stipulated that this immediate aid only becomes taxable from the limits of the tax liability for the solidarity surcharge. This means from a taxable income of EUR 66,915 for single taxation and EUR 133,830 for joint taxation of spouses. From a taxable income of EUR 104,009 or EUR 208,018, the entire immediate aid is taxable. For the income between these respective amounts, the term **"mitigation zone"** is introduced. For the income tax liability of the December aid between these two amounts - i.e., in the mitigation zone - only the text of the law can help as an explanation of the amount of tax liability:

"In the mitigation zone, only the fraction of the relief under section 123(1) that is the difference between the taxpayer's individual taxable income and the lower limit of the mitigation zone divided by the width of the mitigation zone is to be included as an attribution amount under section 123(2)."

It only remains to be noted that taxation is to take place in the year in which the pension companies issue a statement of account for the amounts of immediate aid! As a rule, this should be the year 2023.

By the time this tax return is submitted, the tax liability in the mitigation zone can certainly be explained in more detail.

Income tax

Income from employee shareholdings: Income from capital assets or from employment?

If an employee participates in his employer's capital, the participation can be an independent source of income, so that the related income and expenses are not connected to the employment relationship in a way that is significant for income tax purposes. This was the decision of the Baden-Württemberg Fiscal Court.

In this case, the employee uses his capital as an independent source of income independent of the employment relationship. The current income generated from this is then not income from employment, but income from capital assets.

Claiming private tutoring costs against tax in the case of learning difficulties

If a child's learning difficulty has been certified by a public health officer or the Medical Service of the Health Insurance Fund, the costs for private tutoring can be deducted as extraordinary expenses if the costs incurred exceed a certain limit. The amount of the expense limit depends on the marital status and the income of the parents.

However, it is a prerequisite that the certificate has been obtained before the tutoring sessions begin. The best-known learning disabilities include dyslexia, dyscalculia, attention deficit disorder (ADD) and attention deficit hyperactivity disorder (ADHD).

Not only can the costs for tutoring sessions with qualified tutors be deducted, but also, for example, costs for visits to the doctor and medication, for psychotherapeutic treatment or for corresponding travel costs, if the health insurance fund does not cover them.

Long-standing practice of paying employee bonuses to employees without legal obligation - provision possible

A liability arising in the future had its economic cause in the past if the employee bonuses were mainly intended to compensate for the performance of the employees in the past financial year (here: bonuses as an additional compensation instrument in addition to fixed salary or salary components): Bonuses as an additional remuneration instrument besides the fixed salary or other salary components). From this follows an inducement connection with the work performance of the employees for the past business year.

This is not contradicted by the fact that employee bonuses also serve the purpose of binding employees to the company for the future, if this is merely a secondary purpose which at least does not override the main purpose (compensation for work performed in the past financial year). According to the Münster Fiscal Court.

When setting up provisions, circumstances affecting value that became known at the latest by the time the balance sheet would have had to be prepared in the ordinary course of business can be considered. Insofar as the criteria considered when determining employee bonuses (growth dynamics, order backlog, earnings development, financial situation) are based on the balance sheet and the annual report of a financial year, these are circumstances that already existed on the respective balance sheet date but only became known in the period between the balance sheet date and the preparation of the balance sheet.

VAT

BMF draft letter on the zero tax rate of certain photovoltaic systems

The Federal Ministry of Finance (BMF) intends to answer the first questions from practitioners as soon as possible and has published a first draft letter on the zero-tax rate for certain photovoltaic systems.

The letter clarifies several points that had caused uncertainty in practice. The draft now ensures that the sale or even the gratuitous transfer of a PV system by an entrepreneur (who is not a small entrepreneur) to a purchaser will represent a non-taxable sale of a business. If the purchaser wishes to make use of the small business regulation, he must therefore keep an eye on the regulations on input tax adjustment.

In the past, many operators of PV systems waived the small business regulation for VAT purposes because it was more economical for them to claim the input tax deduction at the time of purchase. Consequently, they had to subject privately consumed electricity to value added taxation. The deducted input tax was thus offset downstream. This will not change after 31 December 2022.

However, entrepreneurs who purchase a PV system from 2023 onwards will not be able to deduct input tax due to the zero-tax rate. The BMF draft letter clarifies that therefore no compensation of an input tax deduction is necessary and consequently, in contrast to the current situation, no tax is payable on the free transfer of value for the private purchase of electricity. New plant operators thus generate an economic advantage.

Removing old plants from company assets and using them as private assets should become more attractive. Although the withdrawal of an old investment is taxable, it is to be taxed (only) at the zero-tax rate under the other conditions. At this point, the draft provides for a serious restriction. The withdrawal is only to be possible if at least 90% of the electricity generated is used for non-business purposes.

Note

From the point of view of the German Tax Consultants Association, there is no legal basis for this! The association therefore calls for the 90 % limit to be waived.

Input tax deduction from only occasional purchase of luxury vehicles

The dispute before the Federal Fiscal Court was whether a business context or an economic activity could be derived solely from the subjective circumstance that the vehicles were acquired as an investment with the aim of later selling them and therefore with the intention of generating income, or whether objective criteria had to be fulfilled.

The Federal Fiscal Court took the view that the input tax deduction from the only occasional purchase of a passenger car was only due to an entrepreneur with a different main activity if an economic activity was thereby established or the main economic activity of the entrepreneur was directly, permanently and necessarily expanded.

Inheritance / gift tax

Methods of evaluating a property for the purposes of gift tax

If you want to give your son or daughter a special gift for a special occasion, you give him or her a small house for the new chapter in their lives. This is what a father did in the following example case, but he was so sensible that he left the choice of the property with building, carport and garden to the daughter and only (!) paid for the property acquired by the daughter with a notarial deed. In addition to the purchase price of EUR 900,000, he also paid the land transfer tax and the notary and land registry costs. After the wedding ceremony, the responsible tax office approached the father and demanded a gift tax declaration - he had also assumed this tax in the gift contract with the daughter.

The father determined the value of the property in accordance with the valuation method described in the Valuation Act at approximately EUR 520,000. He did not

consider the comparative value method, which has priority for single-family houses, because the expert committee for land had informed him that no comparative value was available for the location of the property. The value for gift tax purposes, including the assumed land transfer tax of 6.5% and the notary and land registry costs, thus amounted to EUR 593,000. To this the gift tax was added itself, which the father had assumed. In its gift tax assessment, however, the tax office did not follow the calculated value, but used the purchase price as a basis, because this was available as a comparison price. Since the father did not want to follow this argumentation, the case was brought before the tax court and finally before the Federal Fiscal Court.

In its ruling, the Federal Fiscal Court took the view that in the absence of comparable prices for other properties, a purchase price agreed for the property in question close to the time of the donation can also be decisive. This purchase price was available here. By applying the comparative value, the gift tax thus amounted to EUR 125,200 instead of a tax of EUR 23,562 in the valuation according to the asset value method. The different amounts result as follows:

Calculation tangible value

EUR 593,000 (initial value) - EUR 400,000 (exemption) = EUR 193,000 + EUR 21,230 (11% assumed tax) = EUR 214,230 (taxable value) of which EUR 23,562 (11% tax)

Calculation comparative value

EUR 973,000 (comparative value) - EUR 400,000 (exemption) = EUR 573,000 + EUR 85,950 (15 % assumed tax) = EUR 658,950 (taxable value) of which EUR 125,200 (15 % tax)

This example shows the pitfalls that lurk in such transactions and the significant impact that the different valuation methods have on the tax to be assessed.

Trade tax

Maintenance costs for leasing contracts to be added for trade tax purposes

The term “leasing instalments” in the Trade Tax Act is to be understood in economic terms - just as in the case of rent and leasehold interest.

Maintenance costs that are contractually passed on to the lessee are part of the “leasing instalment” and are to be added for trade tax purposes.

The Federal Fiscal Court (Bundesfinanzhof) has stated in a ruling that leasing instalments have been expressly included in the addition when determining trade income under the 2008 Business Tax Reform Act. They are to be added if the asset for which the leasing instalments are paid is owned by a third party. In these cases, leasing is comparable to renting. The contractual passing on of ancillary costs from the landlord/lessor to the tenant/lessee typically has the effect of reducing the “pure” rent or lease payment, as does the passing on of maintenance costs to the lessee regarding the amount of the leasing instalment. In economic terms, the special payments for the maintenance work are nothing other than parts of the remuneration that the lessee has to pay for the transfer of use, including use and the wear and tear associated with use. It would be inconsistent with uniformity of taxation if the consideration for maintenance were treated differently depending on whether it was included in the lease payment or paid separately.

Property transfer tax

Property transfer tax on the sale of land subject to reservation of usufruct

If the purchaser of the real estate leaves the seller (or a third party) rights to use the land (usufructuary and residential rights) without appropriate compensation, this is a pecuniary advantage which the purchaser gives up for the acquisition of the property and which must therefore be included in the basis of assessment for property transfer tax. This was the decision of the Baden-Württemberg Fiscal Court.

However, if the seller of the real estate appropriately compensates for the reserved uses, the transfer of use does not constitute consideration for the real estate within the meaning of the Real Estate Transfer Tax Act. Whether the seller has reserved the right to use the property without reasonable compensation must be determined by interpreting the purchase contract.

Procedural law

Substitute delivery by deposit in case of impossibility of depositing a tax assessment notice

According to the Düsseldorf Fiscal Court, the impossibility of depositing a tax assessment notice in the letterbox or a similar device set up for receiving mail is a prerequisite for its effectiveness for substitute delivery by depositing it at the post office.

If the notification of a deposit is put in the letterbox, there are therefore serious doubts as to the effectiveness of the substitute delivery. This is because, as can be seen from the present postal delivery certificate, in the case in dispute the deliverer put the notification of the deposition in the letterbox of the applicant's authorised recipient. From a factual point of view, there is nothing to indicate that the tax assessment notices themselves could not have been deposited in this letterbox into which the notice was deposited.

Effective dismissal of a GmbH managing director - No liability for wage tax debts

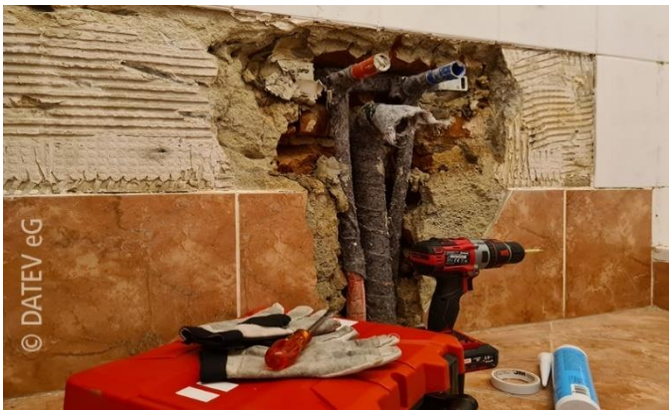
Upon dismissal as managing director, the managing director's activity shall be terminated. This applies irrespective of the time at which the termination is entered in the commercial register. However, the entry has only declaratory effect, i.e. the beginning and the end of the position as managing director under company law - and thus also the coming into existence and the expiry of the position as managing director under tax law in the case of GmbH managing directors - depend solely on the content and the effectiveness of the shareholders' resolution. The public reliance on the commercial register has no influence on liability under § 69 AO.

Although in the case in dispute before the Düsseldorf Fiscal Court there was no written shareholders' resolution in which the dismissal was clearly expressed, there was no general requirement for shareholders' resolutions to be specific, and certainly no requirement for them to be expressive, so that implied resolutions were also possible. Considering the aforementioned principles, the plaintiff's position as managing director was terminated at the time in question.

Civil law

Declaration of rent increase due to modernisation measures - itemised list of all costs not necessary

A landlady had justified the increase in rent with the installation of a new central heating system and thermal insulation. She handed the tenant a tabular list of the measures and their total and repair costs.



The plaintiff refused to pay the required rent increase for formal reasons.

However, the Federal Court of Justice considered it sufficient for landowners to state the total costs of a modernisation measure as well as the deducted costs for maintenance measures saved by this in the declaration of increase. The detailed list of items and trades was not necessary in this case.

Dates Taxes/Social Security — March/April 2023

Tax Type		Due date	
Wage tax, church tax, solidarity surcharge		10.03.2023[1]	11.04.2023[2]
Income tax, church tax, Solidarity surcharge		10.03.2023	Not applicable
Corporation tax, solidarity surcharge		10.03.2023	Not applicable
Value added tax		10.03.2023[3]	11.04.2023[4]
End of the grace period for the above tax types upon payment by:	Bank transfer[5]	13.03.2023	14.04.2023
	Cheque[6]	10.03.2023	11.04.2023
Social insurance[7]		29.03.2023	26.04.2023
Capital gains tax, solidarity surcharge		The capital gains tax and the solidarity surcharge thereon must be paid to the competent 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, for quarterly payers for the past calendar quarter.
3 For the past month, in the case of a permanent extension for the penultimate month.
4 For the past month, in the case of a permanent extension for the month before last, in the case of quarterly payers for the past calendar quarter. (Without permanent extension) for the past calendar quarter.
5 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 due date. No late payment surcharges will be levied for late payments of up to three days. A transfer must be made early enough to ensure that the value date for the tax office's account is the same as the due date.
6 If payment is made by cheque, it should be noted that payment is not deemed to have been made until three days after the cheque has been received by the tax office. A direct debit mandate should be issued instead.
7 Social security contributions are uniformly due on the third last bank working day of the current month. To avoid late payment penalties, direct debiting 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. 27.03.2023/24.04.2023, 0 o´clock in each case). Regional peculiarities regarding the due dates must be observed if necessary. If payroll accounting is carried out by external agents, the wage and salary data should be transmitted to the agent about ten days before the due date. This applies if the due date falls on a Monday or on a day after a public holiday.

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