Income tax

Intention to generate income when renting out

The Federal Fiscal Court (Bundesfinanzhof) confirmed its case law in its rejection decision of March 29, 2022, against a non-admission appeal that the intention to generate income in the form of the intention to generate surplus is regarded as the subjective factual characteristic for income from renting and leasing. The intention to generate income in the form of the intention to generate surplus is, as a subjective factual characteristic, specific to the type of income and specific to the area, while the intention to generate income in its specific form of the intention to generate profit in accordance with the Income Tax Act has a different objective (taxability of the asset level) than the intention to generate surplus. Furthermore, in the case of a long-term rental activity related to residential real estate, it is typical to assume the existence of an intention to generate income. Whether the landlord/taxpayer actually achieves a total surplus is irrelevant, because a forecast verifying this does not occur.

Note

In order to distinguish permanent leasing from hobby, it is necessary that the intention is to achieve a surplus of income over expenses for the duration of the use of the source of income.

As a rule, the intention to generate income in the form of the intention to achieve a surplus must always be examined in relation to the property. The examination can take place at any time (before, during or after a rental period).

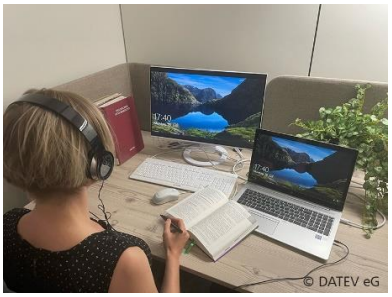
In contrast, the standardisation of the intention to realise income does not apply to real estate that is not used for residential purposes (commercial real estate). In this case, it had to be examined on a case-by-case basis whether the taxpayer had intended to achieve a surplus of income over income-related expenses for the expected duration of use. In this respect, the taxpayer had to demonstrate and, if necessary, prove the existence of the intention to realise income. Further subjective elements, such as the taxpayer's motive in accepting (temporary) surpluses in income-related expenses, were not part of the intention to realise income in the case of income from letting and leasing, which was specific to the type of income and the area.

Due date requirement for the ten-day rule

In the case in dispute, the plaintiff determined his commercial profit by means of a surplus revenue statement. He paid the VAT for the months of May to July 2017 late (only on 9 January 2018), but nevertheless claimed the payment as a business expense for the year in dispute 2017. The tax office did not grant the deduction. It was of the opinion that there were no regularly recurring expenses within the meaning of the Income Tax Act, as the turnover tax in question had not become due around the turn of the year 2017/2018, but much earlier. The appeal and action against the income tax and trade tax assessment notice were unsuccessful.

The Federal Fiscal Court rejected the appeal. It is true that turnover tax payments are regularly recurring expenses. Furthermore, the plaintiff had also paid the turnover tax economically attributable to the year in dispute 2017 within a short time after 31 December 2017. However, it must also be added that the respective expenditure had also become due shortly before or after the end of the year of economic affiliation.

The home office in times of Covid-19



According to the Income Tax Act, the costs of a home office and the costs of furnishing it are deductible if the employee or entrepreneur has no other workplace available. This home office must be equipped with the necessary furniture/furnishings. However, this does not only have to be office furniture; the Federal Fiscal Court has also recognised a piano studio of a music teacher in a family home as a home office. The same applies to the home office of an actor and dubbing artist. However, the use must be exclusively or almost exclusively professional. For a room to be recognised according to these principles, the deductible costs are limited to 1,250 euros per year. A deduction in excess of this is only possible if the study forms the centre of the entire business or professional activity. If this is the case, all expenses without the maximum limit can be income-related expenses or business expenses. According to the case law of the Federal Fiscal Court, however, many members of the consulting professions fall under the limitation rule, because in many cases their main activity is carried out at the location of the commissioning company and thus the centre of activity is there.

Since the beginning of the pandemic, however, another deduction regulation with lump sums can also be claimed. This is not subject to the condition that no other workplace is available. In order to prevent the contraction of Covid-19, the employer can order the so-called home office duty or make use of it himself. The legislator has introduced a flat rate of 5 euros per working day, up to a maximum of 600 euros per year, for home office work, which can be claimed in lieu of proven costs. A separate home office is not required for these costs. This regulation currently applies from 01.01.2019 until 31.12.2022. For employees, however, this lump sum is offset against the income-related expenses lump sum.

Note

In addition to the home office flat rate, expenses for work equipment (e.g. the costs for a desk, a bookshelf or a PC) can also be deducted as business expenses or advertising costs.

The consequences of "infection" in tax law

Various situations or developments in real life can have unintended tax consequences. These include, for example, "infection." In income tax law, this happens when assets (usually buildings or land) of a partnership are transferred for use to a corporation with or without rent/lease payment, in which one or more shareholders of this partnership are also shareholders with the majority of voting rights in the corporation. In this constellation, the partnership does not generate income from renting and leasing (basic case), but income from commercial operations. In tax law, this constellation is referred to as a business split. It goes back to a decision of the Grand Senate of the Federal Fiscal Court in 1971 (file no. GrS 2/71).

However, not only the income from renting to the controlled corporation is affected, but all income of this partnership, such as renting to other tenants or interest income or dividends. This is then the "infection" mentioned at the beginning.

This reclassification of income has many consequences. First of all, it leads to the partnership's liability to trade tax on the entire profit. Furthermore, all sales or withdrawals of real estate or other assets from the partnership are also taxable, regardless of the time of acquisition (the ten-year period does not apply!). If the accounting limits according to § 141 AO are exceeded, the profit must be determined by balancing by means of commercial accounting. Finally, the partnership is also subject to external tax audits according to §§ 193 ff. AO.

The tax consequences can be particularly unpleasant, as they can be expensive, if the split ends unplanned. This can happen, for example, as a result of changes in shares in the case of a gift or an inheritance. If control ceases, this necessarily results in the termination of the business split. The co-entrepreneurial shares become private assets with the consequence of a withdrawal taxation of the assets from the partnership at fair market value. All hidden reserves are recorded for tax purposes and taxed, without the partners receiving any liquidity as a result of this process.

Note

When the business split comes into existence, the shares of the corporation become necessary special business assets of the respective co-entrepreneur.

If the above-mentioned unintentional termination occurs, these shares must also be transferred to the private assets at their fair market value.

The explanations on the division of a business also apply to a taxpayer if the prerequisites are met. In this case, the tax effects are the same as described above.

VAT

Services of a museum guide can be exempt from VAT

The plaintiff works as a tour guide in a museum that can only be visited by group tours. The plaintiff's client is a non-profit foundation that operates the museum and provides tax-exempt turnover to the museum visitors. The competent district government certified that the plaintiff, as a museum guide, fulfils the same cultural tasks as comparable institutions under public law. The tax office assumed that the plaintiff's turnover was nevertheless subject to VAT.

The Federal Fiscal Court confirmed that the turnover of state museums as well as "similar institutions" of other entrepreneurs were tax-exempt if the competent state authority had certified both the museum and the museum operator that they fulfilled the same cultural tasks as the state museums. The typical museum services, which also included guiding guests, were tax-exempt. The museum with which the service provider rendered its museum service could also be the museum of a third party (here: the foundation). However, it is also clear that the services of other independent subcontractors of the museum, who do not have a corresponding certificate because they do not themselves provide cultural services (e.g., security, cleaning or caretaker services of the museum), are not exempt from VAT.

No input tax deduction possible from illicit purchases

The Münster Fiscal Court ruled that an input tax deduction from illicit purchases identified by the tax investigation is not possible if no corresponding invoices are available. The plaintiff ran a kiosk. During a tax investigation audit carried out at a supplier's premises, it was discovered that the supplier had allowed the plaintiff to purchase goods in return for cash payment without a proper invoice. As a result, a tax audit carried out at the plaintiff's premises led to the conclusion that the plaintiff had not recorded the supplier's incoming sales and the corresponding outgoing sales in its bookkeeping. The defendant tax office estimated the turnover of the plaintiff but did not grant any input tax deduction on the black purchases due to the lack of invoices.

VAT for card deposit charged for the provision of electronic payment cards?

The question was whether a so-called card deposit for the acquisition of an electronic payment card constitutes a taxable and taxable service or whether it is a non-taxable compensation service. If the qualification as compensation is denied, does the provision of the payment card then represent a dependent ancillary service to the (non-taxable) exchange of means of payment or is it an ancillary service to the tax-exempt turnover of legal means of payment or the tax-exempt turnover in payment transactions?

The Federal Fiscal Court ruled that the card deposit levied within the framework of a cashless payment system for the provision of electronic payment cards in stadiums is not a lump-sum compensation for damages (conditional on the return of the card), but a taxable other service that is tax-exempt as a turnover in payment and transfer transactions if the providing company itself carries out the transfer of funds.

Inheritance tax

Tax allowances in the case of several successions

According to a ruling of the Federal Fiscal Court (Bundesfinanzhof), if several testators have appointed the same previous heir and, after his death, the same subsequent heir, the subsequent heir is entitled, upon application, to only one tax-free amount for all the estates subject to the succession.

In the case in question, the grandfather and the grandmother of the plaintiffs died. The grandparents had appointed the plaintiffs' aunt as their predecessor and, upon her death, the plaintiffs, among others, as their successors. In 2015, the aunt died and was in turn inherited by the plaintiffs, among others, as co-heirs. The plaintiffs' father had already predeceased the previous heir. In the inheritance tax return, the plaintiffs requested that the taxation of the inheritance be based on their relationship to the grandparents. The tax office took into account tax allowances of 400,000 euros per heir in the inheritance tax assessment notices to the plaintiffs.

Trade tax

Addition of the property tax contractually apportioned to the tenant running the business

For the purposes of trade tax, the profit from business operations is modified by additions and deductions. Among other things, one eighth of the rent and leasehold interest for the use of immovable fixed assets is to be added, insofar as the expenses have been deducted when determining the profit.

A Gmbh (private/limited liability company) had rented a company building from its shareholders. It was agreed in the rental contract that the GmbH, as the tenant, should bear the property tax. The tax office was of the opinion that the property tax contractually apportioned to the GmbH belonged to the rent to be paid by it and was therefore to be added for trade tax purposes. The tax court took a different view and upheld the claim.

However, the Federal Fiscal Court ruled in favour of the tax authorities. The term “rent” used by the law was to be understood in economic terms. This also included expenses borne by the tenant which, according to the burden-sharing system typical of the law, would actually have to be borne by the landlord, but which were contractually assumed by the tenant. Such a case existed here. The debtor of the property tax was the owner, i.e. the landlord. Under civil law, however, the property tax could be passed on to the tenant. It was thus included in the rent, which was to be added in part under trade tax law. The addition could therefore not be reduced by the tenant assuming expenses that would actually have to be borne by the landlord and the landlord accepting a correspondingly reduced rent in return.

Procedural law

Additional estimate after external audit of a retail business

The Lower Saxony Fiscal Court has ruled that there is no change with regard to an additional estimate if there is only a certain probability that business income was not declared.

Tax assessments are to be revoked or amended if facts

or evidence subsequently become known that lead to a higher tax. Facts within the meaning of this provision are all factual elements that can be a feature or part of the statutory taxable event, i.e., conditions, processes, relationships and properties of a material or immaterial nature. Facts are the characteristics that constitute a tax-related matter of fact, because subsumed under said fact they result in the tax consequence. Auxiliary facts, which allow a conclusion to be drawn as to the existence of a main fact, which is an element of the statutory factual situation, could also open up the power of the tax authority to amend. However, auxiliary facts may only be used if they allow a certain conclusion to be drawn on the existence of the main fact; mere presumptions or probabilities are not sufficient for this. Furthermore, it follows from the "insofar as" sentence that an amendment of the bases of taxation is only permissible to the extent that the subsequently discovered fact is the cause of a higher tax assessment. The tax authority bears the burden of establishing the actual conditions.

The tax authority shall estimate the bases of taxation insofar as it cannot determine or calculate them. In doing so, all circumstances that are of importance for the estimate shall be considered. In particular, an estimate shall be made if the taxpayer is unable to submit books or records which he is required to keep under the tax laws, if the books or records are not used as a basis for taxation under section 158 AO, or if there are factual indications that the information provided by the taxpayer on taxable income or increases in business assets is incorrect or incomplete. In the case of entrepreneurs who calculate their profits by means of a surplus revenue statement, on the one hand, the obligation under turnover tax law to record business income must be observed, since it also has a direct effect on the income tax law. On the other hand, the regulations on the regularity of accounting must be observed.

Submission deadline for tax returns for the 2020 assessment year extended

Last year, the Federal Council already agreed to extend the deadline for filing the 2020 tax return. If members of the tax advisory professions are commissioned with the preparation, the deadline will be extended to 31 August 2022. At the same time, the grace period for the exemption from default interest on tax debts will also be extended to 1 October 2022.

Labour law

Twelve euro minimum wage from October 2022

With the cabinet decision of 23 February 2022, the federal government initiated a one-time statutory increase of the minimum wage to twelve euros gross per hour. This central concern of the federal government has now been implemented and will come into force on 1 October 2022.

Dates Taxes/Social Security — July/September 2022

Tax Type		Due Date	
Wage tax, church tax, solidarity surcharge		10.08.2022[1]	12.09.2022[1]
Income tax, church tax, solidarity surcharge		not applicable	12.09.2022
Corporation tax, solidarity surcharge		not applicable	12.09.2022
Value added tax		10.08.2022[2]	12.09.2022[3]
End of grace period of above tax types when paid by:	Bank transfer[4]	15.08.2022	15.09.2022
	Check[5]	10.08.2022	12.09.2022
Trade tax		15.08.2022[6]	not applicable
Property tax		15.08.2022[6]	not applicable
End of grace period of above tax types when paid by:	Bank transfer[4]	18.08.2022	not applicable
	Check[5]	15.08.2022	not applicable
Social security[7]		29.08.2022	28.09.2022
Capital gains tax, solidarity surcharge		The capital gains tax and the solidarity surcharge thereon 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 past month, in the case of a permanent extension for the penultimate month.

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 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.

5 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.

6 In the federal states and regions where 15.08.2022 is a public holiday (Assumption Day), the tax is due on 16.08.2022.

7 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. 25.08.2022/26.09.2022, 0:00 o'clock each day). Regional peculiarities with regard to the due dates must be observed, if applicable. If payroll accounting is carried out by external agents, the wage and salary 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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