



# Newsletter

For our clients and business associates

December 2009

## Editorial

Ladies and Gentlemen,

In early December 2009, the Savings Bank Association [Sparkassenverband] and Deutsche Bank CEO Josef Ackermann developed ideas for founding a credit fund for commercial banks. The aim was to increase the provision of corporate loans. Initial euphoria and enthusiasm on the part of politicians was followed by the necessary soberness, however, since after having given some thought to the issue, organising such a fund and the practice of extending credits turned out to be much more difficult than expected in the first flush of excitement. It also became clear that realising this idea required more time than expected. Selecting borrowers and the documents required for examining their credit worthiness will also involve a considerable amount of time. Experts therefore doubt whether such a credit fund will in fact ever be set up. Certainly, banks are highly interested in the idea since they must back corporate loans in part with their own equity capital. The projected credit risk for 2010 is another factor causing banks to be hesitant about extending corporate loans as this would require a further increase in the proportion of their equity capital.

Companies must therefore prepare solid credit check documentation for the lending negotiations with banks in order to solve this dilemma at least partially by themselves. This includes presenting plausible written business models and forecasts. The forecasts can only be supported with general economic forecasts and experts' estimates of the industry as a whole. Company-specific projections should round off the future outlook to the extent possible.

As before, the necessary financial figures to be submitted will consist of the most recent annual financial statements, budgeted balance sheets and income statements, budgeted cash flow statements and plausible liquidity planning as well as financial and capital expenditure budgets/planning. In any case, information that cannot be immediately derived from these figures should be explained in writing with an eye to providing the lender with all significant information for swift credit investigation. An unbiased view is necessary when preparing, mentally, and argumentatively, for loan negotiations with banks, keeping in mind that banks must perform a very critical and detailed analysis and examination of the information received from the borrower. Preparing the credit application and the respective credit negotiations on the basis of a well founded business analysis thus increases the chances for a positive outcome. We will gladly assist you in such a project with our business and managerial skills and our practical experience in this field. The improved general economic outlook in Germany may bring additional positive momentum to your credit relationships.

We wish you a Merry Christmas and all the best for 2010 in both your private and business life.

Sincerely yours  
Friedrich Schröder

## Events

- 28 January 2010,  
17:00-19:00  
**VAT in practice**  
AWT Horwath, Munich
- 8 February 2010,  
14:30-17:30  
**Tax law for NPOs 2010: current legislation and administrative guidance - practical recommendations and discussion**  
AWT Horwath, Munich

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Friedrich  
Schröder


**AWT HORWATH NEWS**

## 50th Annual Meeting of Crowe Horwath International

This year Crowe Horwath International held its Annual Meeting from 15 to 18 November in Beijing under the motto "One Brand, One Vision". More than 225 delegates and 65 supporting individuals from 65 countries came together. Five new partner firms were accepted into the network during the meeting, among them the new partner firm in Beijing, Crowe Horwath China Certified Public Accountants, the seventh largest auditing firm in China.

Interesting and current talks and workshops characterised the meeting which was opened by the guest speaker Dr. Liu Yu Ting, Director General of

the Accounting Regulatory Division of the Ministry of Finance who talked about the future of auditing in China. Mark Hildebrand, Chairman of the Board of Directors of Crowe Horwath International, introduced the 2010 – 2013 Strategic Plan. Other issues included "Building the Global Brand" or "How to Help Clients Succeed and Win New Business".

The participants used the opportunity to exchange opinions on the development of the profession in the respective countries and to get to know each other better personally. These personal contacts in particular increase the network's value for both our clients and

ourselves.

On the last evening the network celebrated its 50th anniversary with a successful event which was also the first birthday under the new name of Crowe Horwath International.

Three of our partner colleagues attended:

Mr. Andreas Haas, Mr. Manuel Rauchfuss (Member of the International Tax Committee and Chairman of the EMEA (European, Middle East and African) Tax Committee at Crowe Horwath International) and Mr. Claus Peter Scheucher (Member of the 10-member Board of Directors at Crowe Horwath International). ■



*The board of directors visiting the office of our new Chinese partner firm*



*Andreas Haas (AWT Horwath), Michael Asderis (HSA Horwath), Claus Peter Scheucher (AWT Horwath), Gerald Hespelt (HSA Horwath), Dr. Jürgen Hutzel (RWT Horwath), Michael Schmitz (HSA Horwath), Manuel Rauchfuss (AWT Horwath)*

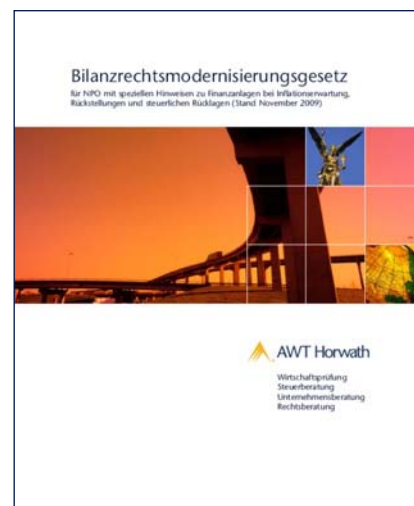
## BilMoG for NPOs

We would like to draw your attention to our 20-page script concerning the impact of the Accounting Law Modernization Act [Bilanzrechtsmodernisierungsgesetz (BilMoG)] on non-profit organisations with special remarks concerning financial investments in times of anticipated inflation, as well as accruals and tax reserves.

In particular, the script deals with current practical issues associated with accounting under the BilMoG which are still being widely neglected in technical literature, taking into account the

special features of non-profit organisations.

You can order the current version dated 30 November 2009 free of charge over the telephone (+49 89 76906-0). We would also like to point out that a current special issue of our Newsletter has been published that deals with the non-profit nature of organisations, which you can also order free of charge. Messrs. Friedrich Schröder and Claus Peter Scheucher, public accountants and tax consultants, would be glad to answer your questions. ■



**AWT HORWATH NEWS** - *continued***■ Secondment of employees: Insured Abroad**

We would like to draw your attention to a project that we have initiated together with Central Krankenversicherung AG, namely an Internet presentation under the heading: "Versichert ins Ausland" [Insured Abroad].

This site addresses all companies that second employees to other countries, as well as employees who are seconded to other countries by their employers. The site provides comprehensive information about working and living abroad, ranging from preparing for a secondment through to business etiquette and finding the right health

insurance. Our contribution to this Internet site corresponds to our service offer and answers questions concerning social security and aspects of business consulting in addition to labour law and tax issues.

If we have aroused your interest, you can find this website at:

<http://www.versichert-ins-ausland.de>. Our experts, Mr. Wagner, public auditor, tax consultant and attorney, and Ms. Anger, attorney and tax consultant, will be pleased to answer any questions you may send via email to: [entsendung@awt-horwath.de](mailto:entsendung@awt-horwath.de). ■



*WP/StB/RA  
Günter Wagner,  
Partner*



*RA/StB  
Christiane Anger,  
Senior Associated  
Partner*

**ACCOUNTING****■ Pre-inquiries at FREP**

In the future, the Financial Reporting Enforcement Panel (FREP) [Deutsche Prüfstelle für Rechnungslegung (DPR)] will be able to answer individual pre-clearance inquiries on specific accounting problems of capital market-oriented companies. In a press release dated 19 November 2009, the FREP announced that pre-clearance inquiries on complicated accounting matters can now also be raised by capital market-oriented companies outside the two-stage enforcement procedure.

The prerequisites for such inquiries are a sufficiently concrete description of the issue, a proposal for the accounting treatment by the companies themselves and an opinion on such treatment by the (most recently) appointed annual auditor. However, if accepted, the FREP will only provide an oral opinion on the proposed accounting treatment and this response will not have a binding effect within the scope of a subsequent enforcement procedure.

The FREP will process pre-clearance inquiries only in suitable cases and to a limited extent in order to avoid an adverse impact on its primary mission, performing enforcement examinations. The case-based inquiries will be reported to the Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht, BaFin). In individual cases, an inquiry of greater interest may be discussed at the European level (European Enforcement Coordination Sessions). ■

**TAX LAW****■ Solidarity surcharge unconstitutional?**

The question submitted to the Federal Constitutional Court by the Fiscal Court of Lower Saxony as to whether the solidarity surcharge is still constitutional has caused quite a stir among the public.

The background: The solidarity surcharge was introduced in 1991. Initially, this tax surcharge was planned for only a short period and therefore expired on 30 June 1992. The surcharge was not levied from 1 July 1992 to 31 December 1994. The solidarity surcharge was reintroduced starting in 1995, but this time the law did not have an expiration date. Since the reduc-

tion as from 1998, the "Soli" is a 5.5% surcharge on income, corporation, wage and capital gains tax. The issue of constitutionality has been discussed controversially for a long time. In 2006 the Federal Fiscal Court ruled that the solidarity surcharge was not unconstitutional. An opposing constitutional complaint had been raised but was not accepted for review. As a consequence, all pending objections were rejected by a general disposition.

Since the case before the Fiscal Court of Lower Saxony (Ref. 7 K 143/08) has been pending, numerous objections have been filed supported by this case.

The question in this case is whether imposing the solidarity surcharge for 2007 is constitutional. The submission by the Lower Saxony Fiscal Court to the Federal Constitutional Court has little effect in practice. The sole legal consequence from the submission is that the tax office can no longer refuse to suspend the opposition proceedings until the Federal Constitutional Court's decision. Hitherto, suspending proceedings were at the discretion of the tax office, which normally granted the suspension upon application.

Of far greater importance, however, are the actual conclusions drawn by



## TAX LAW - continued

the tax authorities from the submission to the constitutional court. Because the tax offices fear that they would receive a flood of objections against the solidarity surcharge, they reacted quickly. For example, all future tax assessments will be issued with a provisional notice. Such a provisional notice means that the tax office will take the decision of the constitutional court into account ex officio and that this item in the tax assessment may be amended.

What is of primary interest here is the intent to also include the provisional notice for new assessments that concern 2005 and 2006. This means that it may make sense to raise an objection against assessments for these years

that are not yet binding. It seems absurd in this context that the tax authorities rejected objections concerning these years by a general disposition, and are now granting provisional notices. Insofar, taxpayers whose tax assessments have not yet been effectively finalised may be lucky. This gives rise to the constitutionally questionable result that taxpayers, who filed their tax returns for 2005 and 2006 early in order to meet their tax obligations, will now normally no longer have any appeal option.

However, even taxpayers whose assessments can still be changed should not expect too much. The past has shown that the Federal Constitutional Court has declared a law to be retroac-

tively unconstitutional only in absolutely exceptional cases. Experts are of the opinion that if the Federal Constitutional Court were to assume unconstitutionality, the legislative intent would be to grant a deadline for a new regulation. It is also conceivable that the court rules that currently no objections exist while making it clear that this may be viewed differently as from a certain future date on. ■

## LABOUR LAW

### ■ No expiration of statutory vacation claims in the event of permanent disability

In accordance with a ruling of the European Court of Justice dated 20 January 2009, Article 7 I of Directive 2003/88/EC is in contradiction to legal provisions which stipulate that claims to paid annual vacation also lapse upon expiration of the reference period if the employee was considered unfit for work during the entire reference period or a portion thereof, and the employees' incapacity for work continued until the end of employment, so that he was unable to exercise the claim to paid annual vacation. However, the German Federal Labour Court has now abandoned its contradictory ruling (Decision dated 24 March 2009, Ref. 9 AZR 983/07).

Accordingly, the statutory vacation claim of employees no longer expires if they were prevented from taking the vacation due to permanent disability. In effect, this means that employees with long-term disabilities can "save up" their vacation claims over several years. This applies retroactively for all vacation days that had not yet lapsed on 2 August 2006.

However, the Federal Labour Court limits the vested vacation entitlement in the event of disability to the statutory

minimum vacation. Additional contractually agreed vacation in excess thereof can also lapse in the future, to the extent there are clear indications of an intent of the parties to the individual employment contract, which distinguishes between statutory and supra-statutory contractual claims, to arrive at an agreement within the framework of interpreting the employment contract pursuant to §§ 133, 157 German Civil Code [Bürgerliches Gesetzbuch (BGB)].

This ruling was already specified by the Berlin Labour Court (decision dated 22 April 2009, Ref. 56 Ca 21280/08) to the effect that a collectively agreed or statutory special leave, such as granted for example to severely handicapped persons, is not protected against expiration. It remains to be seen whether this restriction will also be confirmed by the Federal Labour Court. We will follow the further developments and return to this issue in a later newsletter.

This ruling may have significant direct financial impacts, not least in cases in which an employee, who was disabled for years, leaves the company because the unused vacation must be satisfied upon the end of employment. ■

## Publisher's Details

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