



# Newsletter

For our clients and business associates

January 2009

## Editorial

Ladies and Gentlemen:

With this first newsletter of the year and on behalf of our partners, staff and colleagues, I would like to wish you all the best and every success for 2009.

Good wishes are particularly called for this year. At the end of 2008, the German economy slowed down dramatically - more than it ever did during the past 20 years. The news in recent months has been characterized by reports about crises: the financial crisis – the banking crisis – the (global) economic crisis. Forecasts for the coming years are gloomy, and good news has become rare.

In times like these it is particularly important to have reliable partners. We appreciate and are grateful for the trust that you, our customers and business partners, have put in us. In all the

years during which we worked together, we have demonstrated that we are a reliable and competent partner for you. With this in mind, we shall master these difficult times together.

Crises represent a challenge: they offer an opportunity for change. Max Frisch, one of the most important post-war writers in the German language, put it like this: Crisis is a productive state. One just has to remove the unpleasant taste of catastrophe from it.

Let us work together to recognise and use this opportunity to restructure, and let us shape the future together with optimism.

With compliments  
Claus Peter Scheucher



Claus Peter  
Scheucher

## Events

- 11 February 2009, 9:30-17:00  
**4th Bavarian Family Business Day**  
HVB-Forum Munich

## ■ Fourth Family Business Day in Bavaria

AWT Horwath is represented as a co-organiser at the 4th Family Business Day in February 2009. Professor Dr Eva Kießling and Mr Günter Wörl will speak on the subject of "Succession as a Gift – Current Inheritance and Gift Tax with a View to Business Succession" (we draw attention here to the attachment to our November 2008 edition of the AWT Horwath newsletter). Mr. Manuel Rauchfuss will participate in the panel discussion about the issue of "Succession". The event is directed exclusively towards entrepreneurs. It offers you, as an entrepreneur, partner or manager

of a medium sized family business, a good platform for the exchange of experiences and information.

We would be very pleased to see you at the event. Further information about the event and the programme can be found at: [www.convent.de](http://www.convent.de).

We would be happy to send you an invitation together with a programme brochure. If interested, please send us an e-mail including your address data to: [awt@awt-horwath.de](mailto:awt@awt-horwath.de) with the keyword: "4. Familienunternehmertag Bayern". ■

## Contents

International Accounting

Annual Tax Act 2009



## INTERNATIONAL ACCOUNTING

### IAS 32: Distinguishing Debt from Equity

On 14 February 2008, the International Accounting Standards Board (IASB) issued amendments to IAS 32 "Financial Instruments - Puttable Instruments and Obligations arising on Liquidation". The new requirements apply for annual periods beginning on 1 January 2009. Earlier application is permitted under certain conditions. Entities that continue to prepare their IFRS financial statements in accordance with standards adopted by the EU must wait until endorsement of the standard by the EU, which is expected for this January.

The provision of the amended IAS 32 is aimed at improving reporting concerning certain financial instruments. According to the currently valid IAS 32, financial instruments that are returned to the issuer by the owner in exchange for a consideration can be classified as liabilities. As a consequence of this regulation, financial instruments which actually qualify as equity capital (e.g., puttable shares in partnerships such as a limited partner's shares), were classified as debt in the context of IFRS regulations.

The previous distinction principles governing classification of equity and debt remain valid in the regulation of the amended IAS 32. However, in cer-

tain exceptional cases, both puttable financial instruments (e.g. deposits), as well as financial instruments with obligations on liquidation qualify as equity.

Specified criteria are to be met cumulatively with respect to classification of a **puttable financial instrument** as equity:

1. Prorata share of the net assets in the event of liquidation of a business entity;
2. Allocation to the most subordinate category of financial instrument on liquidation;
3. Equal equipment of all financial instruments of the most subordinate category (e.g., same termination period, same severance pay formula etc.);
4. No other contractual obligations concerning the issuing of funds by the issuing company;
5. Cash flows allocable to the financial instrument during its term are based mainly on the net profit/net loss for the year, a change in net assets or changes in the corporate value;
6. No other financial instruments or contracts of the issuing entity that include a claim on the net profit /loss for the year, a change in net assets or a change to corporate value, or which lead to a limitation or

determination of the residual claim arising from the puttable financial instrument (so-called misuse regulation).

**Financial instruments which, in the event of liquidation, lead to an entity's obligation** to pay the prorata net assets shall qualify as equity if the following criteria are met:

1. Prorata claim to the net assets of an entity on liquidation;
2. Allocation to the most subordinate category of financial instruments;
3. Equal equipment of all instruments of the most subordinate category on liquidation;
4. Misuse regulation (cf. Point 6).

The new IAS 32 provisions do not impact on the disclosure of minority interests in subsidiaries that have the legal form of a partnership in the consolidated financial statements. These minority interests shall also qualify and be disclosed as debt in future consolidated financial statements.

The regulations in the amended IAS 32 do not yet present a final solution for the problem involved in distinguishing equity capital from debt. IASB and FASB are currently in the process of reworking this issue fundamentally. ■



WP/StB Thomas Steiner, Senior Associated Partner

### IFRIC 17 - Distributions of Non-Cash Assets to Owners

On 27 November 2008, IFRIC issued the IFRIC 17 Interpretation "Distributions of Non-cash Assets to Owners". The scope of application of IFRS 17 relates to non-cash distributions by a company to corporate owners or to distributions where the owners may opt for either cash or non-cash dividends. The provision also provides guidance with respect to the accounting of a lia-

bility concerning such non-cash dividend distributions. A liability should be recognised when a dividend is no longer at the discretion of the entity concerned. This may depend on national provisions; e.g. concerning the dividend resolution, or the announcement of such a dividend. At that date, the dividend obligation is to be recognised at the fair value of the distributa-

ble net assets with neutral effect on operating results. In the same manner, the liability should be adjusted at the end of the following period and on the distribution date with neutral effect on operating results.

This interpretation will be binding for reporting periods beginning on 1 July 2009, according to current planning. Earlier application is permitted. ■

### ED IFRS 7 - Supplements to Notes Disclosures Concerning Debt Instruments

In accordance with a draft issued on 23 December 2008, the IASB also provides for amendments concerning IFRS 7

with respect to debt instruments that are not measured at fair value. The changes will include extended disclosu-

re requirements that are to be presented in tabular form. The commenting period ended on 15 January 2009. ■



## ANNUAL TAX ACT 2009

*StB Dr. Susanne Scharpf, Associated Partner* Following its adoption by the Federal Parliament on 28 November 2008, the Federal Council approved the Annual Tax Act 2009 on 19 December 2008. It was published in the Official Federal Gazette on 24 December 2008. Legislation implemented numerous amendments to many tax laws in the Annual Tax Act 2009. We would like to inform you below about the most important changes concerning the Income Tax Act [EStG] and the General Fiscal Code [Abgabenordnung - AO]. The changes concerning limited tax liability and other tax laws are not covered by this article.

Amendments as a result of the so-called VAT package were embedded in the Value Added Tax Act. In particular, the provisions on the place of supply of services were amended, and the input tax refund procedure was revised. We will inform you in detail about the VAT package in one of the next issues of our AWT Horwath Newsletter. We would also like to point out that the disputed plan to limit the input tax deduction concerning vehicles used for both business and private purposes to 50 % has not been implemented in practice.

The Annual Tax Act includes numerous highly complex amendments which we cannot present conclusively at this time. We would be happy to offer our support in a personal advisory talk so that the requirements and possibilities can be explained in each individual case.

## Income Tax Act Amendments

### 1. Recognition of losses pursuant to Section 2a EStG

The limitation of loss compensation and deduction pursuant to Section 2a EStG no longer applies to losses from other EU states (e.g., EEA states where Germany has concluded a treaty concerning mutual administrative assistance with respect to direct tax and value added tax). With this amendment, legislation responded to the decision of the ECJ of 29 March 2007 concerning REWE Zentralfinanz.

Losses suffered in other EU/EEA states that are subject to a double taxation treaty with Germany and application of a pertaining tax credit system can thus be treated as domestic losses in the event of tax assessment in Germany. The new regulation is to be applied to all assessments that are not yet final and binding.

### 2. Limitation of "provisio safeguarding progression"

Certain foreign income (e.g. from a permanent establishment or from rental/lease), which is tax-free in Germany due to the exemption method in the context of double taxation treaties and which has been generated in another EU member state or in an EEA with whom a treaty on mutual administrative assistance with Germany has been concluded will no longer be included in the so-called progression clause in the future. The new regulation is valid as from the 2008 assessment period.

### 3. New tax exemption for the promotion of company health in Section 3 No. 34 EStG

In accordance with the new tax exemption provision, in addition to wages and salaries, employers may also

pay costs that relate to courses on, say, healthy nutrition or back exercises up to the amount of € 500.00 (tax free) per employee and calendar year. The decisive criterion here is that the measures comply with the requirements of Sections 20 and 20a SGB V [Social Security Code - Book V] in terms of quality and purpose. The regulation already applies to payments made by employers in 2008.

### 4. School fees as a special expense pursuant to Section 10 (1) No. 9 EStG

Parents may deduct 30 % of school fees (excluding accommodation, care and food), but at most, however, € 5,000, as special expenses when their children attend an independently run school or a predominantly privately financed school. Whether a domestic school is concerned or whether the school is located in another EU or EEA member state is now irrelevant. Furthermore, one requirement is that the school must provide the possibility to achieve a recognised school-leaving qualification. In the event of this being a German school that is located abroad, the special expense deduction is also granted when the school is located outside the EU/EEA zone. Provided the preconditions are met, the maximum amount for each child is granted only once per couple. These new regulations apply as from 2008 and also under certain conditions when the tax assessment notes of previous years have not yet become final and binding.

### 5. Loss netting pursuant to Section 15a EStG

Subsequent capital contributions paid into a partnership by a limited partner

do not involve a subsequent possibility to compensate for or deduct an existing offsettable loss. Contributions can only be netted with losses that were incurred during the year the contribution was made. Losses incurred in future business years cannot be offset against the contribution to the extent that the losses result in or increase a negative capital account of the limited partner. The new regulation applies to contributions made from 25 December 2008, the day after the law came into force.

### 6. Factor procedure for married couples

From 2010 onwards an "optional factor procedure" will apply to married couples with double income. Upon request of both spouses, they can then both be taxed according to tax class IV, supplemented by a factor, instead of the tax basis being the combination: III/V or IV/IV. The factor is derived from the relationship of expected income tax for both spouses (determined using the splitting procedure) to the expected wage tax of both spouses when applying tax class IV. If the factor is below 1 it is entered on the wage tax card. In the course of wage tax deduction, the respective employer then applies the determined factor to the wage tax according to tax class IV. In so doing, the splitting advantage can be allocated to both spouses. The procedure is quite complicated in detail, in particular if other exemption amounts are to be taken into account on the wage tax card. ■



## Changes in the General Fiscal Code

### 1. Relocation of IT-based bookkeeping to a foreign country

The fiscal authorities may approve a written request for keeping and storing an IT-based bookkeeping system in a member state of the EU or EEA. As a precondition,

- the state where the electronic books and records are relocated to approves access to the bookkeeping system by the German fiscal administration;
- the German fiscal authorities are in-

formed about the location of the data processing system;

- data access is possible to the full extent, and,
- the taxpayer has duly complied with the duties to cooperate in the taxation procedure to date.

If a taxpayer does not comply with the request to relocate bookkeeping to Germany or relocates bookkeeping abroad without approval of the fiscal authorities, a delay penalty of between € 2,500 and € 25,000 can be charged.

### 2. Extension of the statute of limitations for the prosecution of crimes

In cases of tax fraud, the statute of limitation will in future be ten years rather than the previous five years. In the event of tax fraud, the statute of limitations is deemed interrupted when the person accused is informed about the institution of administrative proceedings or when such an announcement is ordered. These new regulations apply to all statutes of limitation that have not lapsed when this law enters into force. ■

## Changes Concerning Flat-Rate Tax

### 1. Money market funds

Applying flat-rate tax to tax-optimised money market funds was commenced with through the Annual Tax Act 2009. After the transitional period, capital

gains from such fund shares will be subject to flat-rate tax if the respective fund share was acquired on or after 19 September 2008. Flat-rate tax does not apply to fund shares acquired before that date, provided they are sold by 10 January 2011. If sold at a later date, the profit is subject to flat-rate tax, but the price applicable on 10 January 2011 is deemed to be the acquisition price.

xed by the investor when a fund does not distribute earnings, was defined in more detail:

- Certificate funds: According to the adopted version of the Annual Tax Act 2009, dividend equivalent income involves only capital gains from certificates which do not reflect individual shares of stock or an individually published stock index.
- Precise definition of other dividend equivalent income
- Umbrella funds: In this case, neither a change nor a clarification occurred, so that we can continue to assume that shifting within umbrella funds does not lead to dividend equivalent income. However, precise legal regulations are lacking in this respect.

*Prof. Dr. Eva Kießling, Senior Associated Partner*

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### 2. Life insurance

As already mentioned, "property-managing insurance contracts" are regarded as being transparent in tax terms as from 1 January 2009. As a consequence, the insured party is required to tax the income generated from the insurance immediately. A property-managing insurance contract is assumed when

- the capital investment compiled especially for this insurance contract is managed separately, and
- the capital investments do not consist of publicly accessible funds or similar instruments, and
- the person insured or the beneficiary, respectively, is entitled to decide on the sale of the capital investments and their re-investment.

### 3. Scope of dividend equivalent income concerning investment funds

The scope of dividend equivalent income, i.e., income that must also be ta-

### 4. Acquisition date of share swaps

In the case of a share swap, for purposes of the transitional regulation, the shares swapped are deemed acquired at the date of acquisition of the shares.

### 5. Other

- Crediting of foreign withholding tax on capital income is limited to the amount of flat-rate tax.
- Losses from the sale of options that arose up to 31 December 2008, may be set off against premiums from such sale of options up to 2013. ■

**AWT HORWATH NEWSLETTER - SUPPLEMENT**
**Important Dates, Contribution Limits and Non-Cash Remuneration in 2009**
**Tax Deadlines and Periods of Grace in 2009**

Type of Tax	Income Tax	VAT <sup>3)</sup> , Wage Tax			Trade Tax		
	Corporate Income Tax Church Tax for Assessed Person	Church Tax for Employees Preliminary Tax Return/Payment			Real Estate Tax <sup>1)</sup>		
	Prepayment	Monthly	Quarterly	Yearly <sup>2)</sup>	Pre- payment	Half-yearly Payment	Yearly Payment
January		12. 15.	12. 15.	12. 15.			
February		10. 13.			16. 19.		
March	10. 13.	10. 13.					
April		14. 17.	14. 17.				
May		11. 14.			15. 18.	15. 18.	
June	10. 15.	10. 15.					
July		10. 13.	10. 13.				
August		10. 13.			17. 20.		17. 20.
September	10. 14.	10. 14.					
October		12. 15.	12. 15.				
November		10. 13.			16. 19.	16. 19.	
December	10. 14.	10. 14.					

**Details:** Due dates postponed by Saturdays, Sundays or public holidays have been noted, as well as the end of the grace period for payment in bold print next to the tax deadline.  
**Notes:** 1) Real estate tax only: Differing deadlines for small amounts according to municipal provisions. 2) Does not apply to VAT. 3) Permanent extension of deadline by one month is possible.

The three-days period of grace for payments does not apply to payment by cash or cheque, but only for bank transfers. When taking part in the direct debit procedure, the tax due is considered as paid on the due date. For cheque payments, according to the annual tax law 2007, the payment is considered effective only three days after receipt of the cheque!

**Free Meals as Non-Cash Remuneration**

If employees receive non-cash remuneration in the form of free meals for their work, the respective amounts are to be derived from the Non-Cash Remuneration Directive.

The values derived from the Social Security Compensation Directive [Sozialversicherungsentgeltverordnung (SvEV)] are included in the calculation

of wage tax and social security contributions.

Free meals cover breakfast, lunch, and dinner. In the event that the employer does not provide all meals, the prorated non-cash remuneration covers only the free meals granted. No deduction is possible for juveniles and trainees. Lower values are to be stated

for family members. The values fixed as at 1 January 2009 are stated in the table below.

The following amounts apply when free or cost-reduced meals are offered at work. The amounts apply to all employees:

- € 1.53 for breakfast,
- € 2.73 for lunch/dinner.

	Month €	Calendar Day €
<b>Amounts for free meals</b>		
all meals	210.00	7.00
<b>Amounts for partial granting of free meals</b>		
breakfast	46.00	1.53
lunch / dinner each	82.00	2.73

## Free Accommodation or Free Place of Residence as Non-Cash Remuneration

The granting of free accommodation or a free place of residence is to be taken into account in the calculation of wage tax and social security contributions. In this respect, distinction is to be made between a free place of residence and free accommodation:

Free place of residence:

- If an employer provides an employee with a place of residence free of charge, the local rent level is to be used as a measurement base. With respect to incidental costs, the end price at the place of provision is decisive.

- A place of residence is considered to be a closed unit of rooms in which an independent household can be kept.

Free accommodation:

- If rooms are provided that do not qualify as a place of residence, the term 'accommodation' is used.

The following non-cash remuneration values apply for 2009:

- Heating and lighting are included in these values.
- If the employee lives in the household of the employer, or if the accommodation is occupied by several employees, the figures are reduced accordingly.

Non-cash remuneration amount for free accommodation	month €	calendar day €
all over Germany	204.00	6.80

## New Income Limit for the Assessment of Contributions as of 1 January 2009

As from 1 January 2009 the following income amounts apply for social security:

	2009 annually €	2008 annually €	2009 monthly €	2008 monthly €	2009 daily €	2008 daily €
<b>Old Laender</b>						
Health insurance	44,100.00	43,200.00	3,675.00	3,600.00	122.50	120.00
Nursing care insurance	44,100.00	43,200.00	3,675.00	3,600.00	122.50	120.00
Pension insurance	64,800.00	63,600.00	5,400.00	5,300.00	180.00	176.67
Unemployment insurance	64,800.00	63,600.00	5,400.00	5,300.00	180.00	176.67
<b>New Laender</b>						
Health insurance	44,100.00	43,200.00	3,675.00	3,600.00	122.50	120.00
Nursing care insurance	44,100.00	43,200.00	3,675.00	3,600.00	122.50	120.00
Pension insurance	54,600.00	54,000.00	4,550.00	4,500.00	151.67	150.00
Unemployment insurance	54,600.00	54,000.00	4,550.00	4,500.00	151.67	150.00

The annual income limits defined for the assessment of obligatory health insurance are € 48,600 for employees covered by public health insurance.

The limit for employees covered by a private health insurance agency on 31 December 2002 is € 44,100. Note: The pension insurance contribution

rate continues to be 19.9 %, whereas the contribution to unemployment insurance is lowered from 3.3 % to 2.8 %.