



Newsletter

For our clients and business associates

July 2010

Editorial



Manuel
Rauchfuss

Ladies and Gentlemen,

There are growing indications that the financial crisis has, for the most part, been overcome. Nevertheless, the consequences of the crisis will continue to be felt for some time. This is clearly evident at municipal level. However, it would be unwise to attribute the current precarious situation in many municipalities solely to the financial crisis. The financial crisis has merely revealed the symptoms of a chronic malaise that, in the form of an imbalanced financing and budget system has prevailed for a long time now.

This has also been recognized by the legislative body which ever so often operates under the proven motto: In case we don't know how to proceed, we can always form - no, not a working group, but in this case - a commission; or, more precisely, the Municipal Finance Commission, which already held its constituent meeting in March of 2010. Only recently, at a Bundestag [Federal Parliament] meeting held on 9 July 2010, the Federal Government reported on the method for restructuring municipal finances that is currently being discussed. The Bavarian "echo" at the Städtetag [German Association of Cities] was quick to follow. Presently, three major models are being compared.

Under the so-called "test model", trade tax is to be abolished completely. In return, municipalities are to receive an allowance to income tax and corporation tax, equipped with a municipal factor option.

The abolition of trade tax is also envisaged by the Stiftung Marktwirtschaft [Market Economy Foundation] think-tank: Under this model, municipalities are to receive a share of wage taxes as compensation. In addition, municipal corporation tax, equipped with a municipal factor option, is also being considered.

By contrast, the Federal Association of Municipal Umbrella Organizations is trying to retain trade tax while also extending the group of trade taxpayers to include free-lancers, and possibly increase the trade tax measurement base. In particular, trade tax is also to be paid on interest payments.

Thus far, it is not possible to foresee whether a reform of the municipal finance system is actually feasible and, if so, which model will be adopted. Increasingly, there are voices (mostly from the tax authorities), which reject a systems change due to the tremendous bureaucratic effort this type of change would entail.

In our assessment, it is highly unlikely that the municipal finance commission has already discovered the philosophers' stone for municipal finances. The "test model" would lead to an additional burden on earners of small income. Municipal corporation tax is a type of trade tax in disguise, and the third proposed method only extends the scope of application of trade tax requirements. Nevertheless, we see an urgent need for discussion concerning a new regulation. The unequal distribution created under the existing trade tax regulations is strikingly obvious. In our view, a transparent system for the allocation of corporation tax and/or wage tax would certainly be more beneficial than the existing model.

However, to date, we do not see any grounds for optimism that municipal finances will be placed on a solid footing. We can only hope that the outcome of a systems change will not be: The operation was a success - the patient is dead.

With best regards,
Manuel Rauchfuss

Events

- 04.-06.10.2010
EXPO REAL
International Trade Fair for
Commercial Property and
Investment
Neue Messe Munich

As in the previous years, Crowe Horwath International will be present with a team of international experts.

Contents

EMEA Tax Conference of Crowe Horwath International in Dubrovnik

Appointment as Wirtschaftsprüferin

New Associated Partner

DRSC: Termination of Standardization Agreement

EU Endorsement of Changes to IFRS 1

Private Use of a Company Car

Annual Tax Act 2010

Bribery Act 2010 - Risks for German Companies also

Special Supplement on Data Protection



AWT HORWATH NEWS

■ EMEA Tax Conference of Crowe Horwath International in Dubrovnik

This year's Europe, Middle East and Asia (EMEA) Tax Conference of Crowe Horwath International was held from 17 - 19 June in Dubrovnik. The three-day conference, which was hosted by TPA Horwath Croatia, was attended by 70 participants from 29 countries. The participants had the opportunity to attend the following workshops:

- VAT - Planning and Structuring
- Transfer Prices
- EU Update and Current Developments in Tax Structuring of International Job Assignments.

Our staff colleague Ms. Annette Keiner, Tax Consultant, Specialist Advisor for International Tax Law was involved in structuring the workshop

on transfer prices.

The aim of the individual workshops was, inter alia, to intensify cross-border collaborative activities within the Crowe Horwath network through specialist discussions on current topics. In addition, colleagues of the new Crowe Horwath International member firm from Italy, Studio Associato Servizi Professionali Integrati - SASPI, provided the participants with an overview of their activities.

AWT Horwath was represented by Mr. Manuel Rauchfuss WP/StB (Chairman of the European Tax Committee), Mr. Günter Wagner, WP/RA/StB, Ms. Annette Keiner, StB, and Dr. Christoph Sewtz, RA/StB. ■



■ Appointment as Wirtschaftsprüferin

We are pleased to announce a new addition to our team of professionals. Our Associated Partner, Ms. Renate Kleedörfer, has now supplemented her existing qualification as a tax consultant with a qualification as certified auditor (Wirtschaftsprüferin). We congratulate Ms. Kleedörfer on this achievement and wish her every success. ■



Renate Kleedörfer

■ New Associated Partner

We are also pleased to announce a new member of management: Mr. Thomas Weitzl, LL.M. Eur., RA/StB, has been appointed as Associated Partner of AWT Horwath with effect from 1 July 2010. We congratulate Mr. Weitzl on this career step and look forward to our collaboration. ■



Thomas Weitzl

ACCOUNTING

■ DRSC: Termination of Standardization Agreement

At its extraordinary membership meeting held on 28 June 2010, the DRSC (Deutsches Rechnungslegungs Standard Committee = German Accounting Standards Committee) terminated the standardization agreement concluded on 3 September 1998 with the Federal Ministry of Justice (BMF) effective as of 31 December 2010. In this context, the Chairman of the Board of DRSC, Mr. Heinz-Joachim Neubürger, stated that the termination has created a possibility for reshaping public opinion and for representation of

German interests concerning international accounting issues. In the course of the urgently needed reorganisation, in addition to the repositioning of contents, the future financing of these important tasks is to be regulated. Upon termination of the standardization agreement, according to § 342 HGB, the previous duties of the DRSC are to be retransferred to the Federal Ministry of Justice with effect from 1 January 2011. The Federal Ministry of Justice will have to decide on the new organization.

The termination must be viewed against the background of controversial issues regarding the financing of this body, and in particular questions relating to the competence of the DRSC. In this context, a major aspect for the future is the need for ongoing appropriate, professional and independent representation of German accounting interests, in particular also of mid-sized companies (cf. IFRS for small and medium-sized entities - SME) at international standard setting bodies (IASB, IFRIC, etc.). ■



ACCOUNTING - *continued*

■ EU Endorsement of Changes to IFRS 1

The European Union passed the Amendment to IFRS 1 "First-time Adoption of International Financial Reporting Standards" on 26 Novem-

ber 2009. Consequently, mandatory EU application of the change in IFRS 1, which was published by IASB in November 2008 (see also AWT Newsletter

1/2009), is required for financial years beginning after 31 December 2009. EU endorsement has already taken place. ■

TAX LAW

■ Private Use of a Company Car

The private use of company cars has already become a permanent issue under tax law. Only recently, the Federal Fiscal Court (Bundesfinanzhof (BFH)) established in two decisions (Re: VIII R 24/08 and VIII B 258/09) that the use of several company cars by one person is also taxable under the so-called 1 % method by including the list prices of all company cars used by that person. As a result, taking 1 % of the combined list prices yields the proportion of taxable private use of the company car per month. This decision related to use by an entrepreneur. However, it can be assumed that the same principles are also applicable to vehicles assigned to employees and, consequently, are subject to wage tax at the rate of 1 % of the list price.

With this decision the Federal Fiscal Court has contradicted the view of the tax authorities, according to which, in the case of private use of several company cars by one person, only the list price of the most expensive company car is taken as a measurement base if it is credible that the company car is not

used by other persons from the driver's household. Since the Federal Fiscal Court favours the vehicle-related view, in the final analysis, the issue is no longer that one person cannot use several vehicles at the same time and, accordingly, only one vehicle at a time is withdrawn from business use. This is supported, on the one hand, by the added value that arises from the ability to choose. On the other hand, the Federal Fiscal Court also refers to the strictly vehicle-related view.

Finally, taxation of all company cars in the context of the 1 % rule can only be avoided by keeping an orderly driver's log.

Furthermore, it should be noted that the 1 % regulation only covers private use. If a company vehicle is also used in connection with other income, it is possible that this must be taken into account for tax purposes. Currently, there is ongoing controversy as to whether, for example, journeys to a private rental property for checking purposes or journeys to a second job

would fall under this category. In this case, company partners would have to recognize such use as a withdrawal, whereas in the case of dependent employees, the use would be viewed as additional employment income subject to wage tax. In return, an income-related expenses deduction in the same amount could be recorded for the respective type of income. This, however, would not in any way apply for a journey to a bank advisor, for example. Following the introduction of withholding tax, income-related expenses incurred in connection with income from capital are no longer deductible. The extent to which the approaches being discussed will be approved by the courts has not yet been conclusively clarified. In the case of a vehicle used within the scope of a taxpayer's second business, the Federal Fiscal Court (Re: VI R 59/06) ruled in favor of an additional withdrawal. It remains to be seen whether or not these principles will also be applied to other types of income. ■

■ Annual Tax Act 2010

The Annual Tax Act 2001 (Jahressteuergesetz - JStG 2010) contains a large number of individual measures that are unrelated or only partly related with respect to the underlying subject matter and that are of a predominantly technical nature. Accordingly, the range of changes and adaptations of the legal texts covers all areas of tax law. The draft of the Annual Tax Act 2010 has been submitted to the Bundestag for a first reading on 1 July 2010. When the JStG 2010 will finally

enter into force is not yet foreseeable. We will inform you in due time in any event. As already announced in our June Newsletter, in this and subsequent newsletters we would like to present the major changes expected from the JStG 2010 that might be of interest to you.

Extending Corresponding Taxation of Hidden Profit Distributions to Final Withholding Tax

Corresponding taxation ensures ap-

propriate tax treatment of hidden profit distributions with the consequence that the partial income method or investment income exemption can only be claimed at the level of the recipient of a hidden distribution if the hidden distribution has not reduced the income at the level of the distributing corporation. Otherwise, a hidden distribution is included in a taxpayer's income determination at the rate of 100 %. This material correspondence between final withholding tax and the



TAX LAW - continued

tax treatment of the corporate entity making the distribution previously did not exist, and is now to be codified in the newly inserted § 32d (2) No. 4 EStG (German Income Tax Act). If a hidden profit distribution reduces the income of the distributing entity and it is not a case of an increase in the income of a related person, the hidden distribution is not taxed at the special withholding tax rate but at the generally higher tax rate arising in the context of tax assessment. § 32d (2) No. 4 EStG (new version) is to apply for the first time for tax assessment periods from 2011.

Assessment of Losses

In a ruling dated 17 September 2008 (Re: IX R 70/06) the Federal Fiscal Court decided that an initial special assessment of a remaining loss carry forward is also required under § 10d (4) Sentence 1 EStG when an income tax assessment for the year in which the loss arose is final and binding, but does not include any items of uncompensated negative income (losses). This enabled the taxpayer to declare initial losses "subsequently", to the extent that the parameters used for determination of the total income had not changed. The legislator intends to

close this gap with the newly formulated § 10d (4) Sentence 4 and Sentence 5 EStG. The new formulation provides for the binding effect of the income tax assessment and the pertaining amounts stated therein and in the assessment notice. Accordingly, an initial or corrected loss determination following a final assessment is only possible if the assessment notice can be changed.

Due to the fact that the provisions for determination of trade losses eligible to be carried forward generally correspond to those of § 10d (4) EStG, the contents of the previously described correction of § 10d (4) EStG were taken over in unchanged form in § 35b (2) GewStG (German Trade Tax Act - new version) for trade tax purposes. Accordingly, the first-time or corrected determination of losses after issuance of a final and absolute tax assessment is only possible for subsequently declared losses if the tax assessment can be changed.

Elimination of Taxation Requirement Concerning the Sale of Objects Intended for Daily Use

In a ruling dated 22 April 2008 (Re: IX R 29/06) the Federal Fiscal Court decided against the long-standing view of

the tax authorities, according to which sales of objects intended for daily use within a one-year period are taxable. The legislator clearly demonstrated that sales of objects intended for daily use are not taxable through a clarifying formulation in § 23 (1) Sentence 1 No. 2 Sentence 2 EStG (new version), to the effect that such objects "are purchased for the purpose of being used and not with the intent of quick sale for profit". ■

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LAW

■ Bribery Act 2010 - Risks for German Companies also

The 2010 Bribery Act was passed in the United Kingdom in April 2010. This is a law which imposes penalties for different kinds of bribery. In particular, it should be noted that German companies can also be affected by this law if an adequate business connection with the United Kingdom (UK) exists.

A business activity, the operation of a branch or permanent establishment or the legal form of the English limited company can already provide sufficient grounds for the existence of such

a connection under certain circumstances. Accordingly, a monetary penalty can also be imposed against a German company if an employee commits an act of corruption and if the company has not taken adequate precautions for preventing corruption. It is expected that the changes will become effective in April 2011.

You can find further information under www.awt-horwath.de or contact us at compliance@awt-horwath.de. ■

SPECIAL SUPPLEMENT ON DATA PROTECTION

■ Requirement for Appointment of Data Protection Officer

Current studies show that the obligations arising from the Federal Data Protection Act (Bundesdatenschutzgesetz (BDSG)) are frequently not realized to a sufficient degree in medium-sized companies. Companies are often not even aware that they are affected by the provisions of the BDSG.

Thus, for example, many companies do not yet have a data protection officer. The appointment of a data protection officer is stipulated as a mandatory requirement in all public entities. In the case of non-public entities, it is necessary to appoint a data protection officer if at least 10 persons are

employed in the processing of personal automated data or if at least 10 persons can access such data. In the case of non-automated data processing, a data protection officer must be appointed only above a threshold limit of 20 employees. Churches and church organizations are subject to additional provisions that replace or are supplementary to the BDSG.

The most recent changes concerning data processing are only insufficiently known and the corresponding reactions are still not in place. With Amendment II of the Federal Data Protection Act of 3 July 2009, in the

newly formulated § 11 BDSG, the legislator issues clear instructions concerning the content of a contract for order data processing and highlights the ordering party's responsibility for complying with data protection requirements. In the case of data processing outside Germany, additional requirements must also be observed.

If your company has not yet appointed a data protection officer or if you have any further content-related questions on data protection, we would be pleased to assist you.

You can reach us directly at: datenschutz@awt-horwath.de. ■

■ New Draft Bill on Employee Data Protection

The Federal Ministry of the Interior recently presented the new draft bill of a law concerning the regulation of employee data protection. Thus, the further development of this legal area is seamlessly continued as a result of BDSG Amendments I-III [Bundesdatenschutzgesetz - German Federal Data Protection Act]. However, the publicity created by data protection scandals in recent months has certainly also contributed to current implementation.

Aims of the Legislator

The draft law is intended to realize the comprehensive legal provisions concerning employee data protection that have been under discussion for decades, while also increasing employers' legal certainty through clear legal regulations. For employers, the law is to create a reliable basis for the implementation of compliance requirements and for combating corruption. At the same time, however, employees are also to be protected against being spied upon at the workplace. The draft bill provides a means of addressing the balancing act of ensuring employees' protection against the unlawful collection and use of personal data on the one hand, and the concomitant pro-

tection of employers' interests on the other. By balancing conflicting interests, the intended outcome is to create a work climate characterized by trust between employers and employees at the workplace.

New Provision in §§ 32 a to 32 I BDSG

The regulatory content of the existing § 32 BDSG has now been significantly supplemented and put into concrete form through the introduction of §§ 32 a to 32 I BDSG. Explicit provisions concerning data collection and data processing prior to and during an employment relationship are to be found in the individual paragraphs. In addition, a special provision that has long been requested, in particular by compliance officers, is now also in place. For the first time, the provision contains a more or less clear presentation of the principles concerning data collection, processing and use to prevent or detect contractual violations, irregularities and criminal offenses in the employment relationship. While some points are still unclear, in particular those relative to the principle of proportionality, by depending on the legal provisions concerning terminations without notice it is nevertheless possible to resort to relevant case law

in current legal practice; this results in a decisive increase in legal certainty. On the whole, it can only be assessed as positive that the previous legal uncertainty concerning data protection in this area is now at least alleviated, although provisions for more far-reaching competences are certainly called for with a view to effectively combating criminal acts.

The legislator sees a subsequent need for introducing further special provisions concerning video surveillance, location tracking systems and biometric procedures, as well as the use of telecommunication services.

Conclusion

On the whole it can be noted that the draft bill is a step in the right direction. Primarily, employers and compliance officers are now directly provided with regulations which, while not answering all questions, nevertheless dispel a range of uncertainties. Finally, with respect to future legislative procedure and initial case law assessments, it remains to be seen whether the new regulation on employee data protection can achieve the planned objectives. We will continue to keep you informed on this topic and can provide you with specific guidance upon request. ■

SPECIAL SUPPLEMENT ON DATA PROTECTION - *continued*

■ Change relative to the "Safe Harbor" Data Protection Agreement

In principle, transmitting personal data from EU member states to other states which do not have data protection laws at levels comparable to those under EU law is prohibited. This principle is already codified in Directive 95/46/EG of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, issued in 1995. This regulation also applies to data transfers to the USA, since that country's data protection laws are not at a comparably high level. In particular, however, it should be noted that these regulations also apply to data movements within international corporate groups.

The Safe Harbor treaty was developed as a data protection agreement with a view to sustaining data communications with the European states despite deficits in the USA. Under the terms of this agreement, US companies can join the treaty if they register in a list maintained by the US Department of Trade and commit themselves to observing the "Safe Harbor Principles". In the process, the EU subsequently acknowledges that the registered

companies ensure a level of data protection comparable to that required under EU law, which makes them eligible for data transfers. Previously, EU companies could declare data exports as admissible for the simple reason that a US company had claimed to be certified with the US Department of Trade.

However, an expert opinion issued in December 2008 by the US consulting firm Galexia under the title "The US Safe Harbor - Fact or Fiction?" established the existence of significant deficiencies in the practical application of the treaty, as well as the fact that the Safe Harbor Principles are frequently not observed. According to the survey, effective data protection at a level comparable to that of European principles was frequently not in place even at certified companies.

The German data protection authorities have now responded to this. The Düsseldorf Group (the top data protection supervisory authorities for non-government and private sectors calling itself the "Düsseldorfer Kreis", after the place where its first meeting was held in 1997) has passed a resolution

dated 28/29 April 2010, according to which any company engaged in the export of data must document its Safe Harbor certification and its compliance with the Safe Harbor Principles for US companies. The minimum test specified by the resolution is a review of the existence and validity of the certification based on a written certificate of the data importer. Certifications more than seven years old are no longer recognized as being valid. Moreover, data importers must fulfil their duty to inform the affected private individuals in the USA about the purpose of data collection and the use of personal data. German data exporters must document this minimum test and submit it upon request as proof to the supervisory authorities, in particular to the data protection official of the respective state.

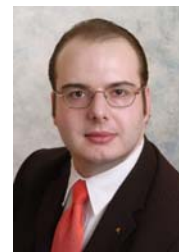
We would be pleased to provide you with the aforementioned studies and information material upon request. If you wish to review your company's compliance with these requirements, you may contact our professional staff directly by writing an email to datenschutz@awt-horwath.de. ■



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