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German Tax and Legal News

BFH questions constitutionality of 6% interest rate on tax payments

Court considers interest rate for 2015 and thereafter to be an unsubstantiated surcharge on additional tax payments.

In a decision dated April 25, 2018 and published on May 14, 2018, Germany's Federal Tax Court (the IX Senate of the BFH) expressed doubts about the constitutionality of the annual 6% interest rate on tax payments. The BFH granted a suspension of the execution of a tax assessment notice concerning interest in the amount of EUR 240,000 on additional tax payments calculated for the years 2015-2017 until the Constitutional Court (BVerfG) rules on the issue.

In the case before the BFH, the taxpayer had argued that, based on the prevailing low market rates, the statutory interest rate during the period 2015-2017 no longer is in line with constitutional principles. The taxpayer had filed an objection against the tax assessment notices and requested a suspension of the execution of the assessed interest payments.

The German tax authorities and the lower tax court of Cologne rejected the taxpayer's application for a suspension of the execution of the assessed interest payments, with the lower court pointing out that the constitutional concerns do not justify the suspension since the public interest in the functionality of the tax administration prevails over such concerns. The taxpayer filed a complaint against the decision of the lower court, which the lower court did not remedy, and the case then was brought before the BFH.

In accordance with its decision dated July 1, 2014 (see GTLN dated [11/10/2016](#) and GTLN dated [08/10/2014](#)), the BFH held that the annual 6% interest rate is unrealistic and inequitable because of structural and solidified low interest market rates during the period 2015-2017. The interest rate appears to be an unsubstantiated surcharge on tax payments. In its 2014 decision, the BFH indicated that the legislature may need to adjust the rate if the market rate has changed significantly and there is no indication that the rate will return to the level that prevailed in 1961 when the rate was introduced into the tax code (see GTLN dated [11/10/2016](#) and GTLN dated [08/10/2014](#)). However, in a recently published decision dated 9 November 2017, the III Senate of the BFH took the position that the 6% interest rate that applied to additional tax payments in 2013 was compatible with market rates for that year and, therefore, constitutional (see GTLN dated [06/03/2018](#)). The III Senate reasoned that investment rates, as well as financing interest rates (e.g. credit card loans, current account overdrafts) within a range of 0.15% to 14.70%, should be taken into account in determining the applicable market rates. This reasoning was rejected by the IX Senate, which has determined that the above are not appropriate reference values to obtain a realistic picture.

It should be noted that the BFH did not issue a final decision on whether the interest rate is unconstitutional because this is the responsibility of the BVerfG. However, in light of several other cases referred to the BVerfG, it is likely that the court will have to rule on the constitutionality of the annual 6% interest rate on tax payments in the near future.

Affected taxpayers that have been subject to interest payments on additional tax payments should monitor developments and keep any relevant assessments open (e.g. by filing an objection and applying for a suspension of proceedings, referencing the case before the BVerfG). Taxpayers also may wish to consider requesting a suspension of the execution of tax assessment notices concerning interest payments calculated for 2015 and thereafter (and possibly also for earlier years). There may be a risk under the latter approach that a

taxpayer-unfavorable decision could trigger additional interest payments of 6% per annum on the amount of deferred interest payments due to the suspension of execution.

[German Summary](#)

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