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German Tax and Legal News

Envisaged amendments to tax criminal law provisions contained in the German Fiscal Code (Abgabenordnung) as part of the planned Second Corona Tax Stimulus Act

Background

The Federal Cabinet is expected to in the short term deal with a draft law on a Second Corona Tax Stimulus Act. For further details on the tax-related measures aimed at stimulating and reinvigorating the economy, we refer to our German Tax and Legal News article COVID-19: [Government agrees on comprehensive financial and tax measures](#).

According to the current plans of the Federal Ministry of Finance, however, in addition to changes to individual tax laws, significant amendments to tax criminal law provisions contained in the German Fiscal Code are to become the subject of the legislative procedure. These changes are not related to or induced by the COVID-19-Pandemic, but owed to the investigation of tax crimes in connection with so-called cum/ex transactions, which are perceived as being lengthy and time-consuming.

The proposed amendments to the Tax Code relate in particular to the extension of the so-called absolute criminal limitation period for serious tax offences, an applicability declaration of an additional five-year suspension of the limitation period at the opening of the main proceedings and, last but not least, to the system of criminal confiscation. They entail considerable potential for toughening up.

Regulations

1. Extension of the so-called absolute limitation period for prosecution from 20 to 25 years

In cases of particularly serious tax evasion, the limitation period for prosecution currently amounts to a maximum of 20 years if criminal investigation measures interrupting the statute of limitations begin at the latest before the expiry of 10 years (regular statute of limitations in cases of particularly serious tax evasion). Pursuant to Section 78c paragraph 2 sentence 2 of the German Criminal Code, the prosecution of tax evasion is currently time-barred at the latest when twice the statutory limitation period has lapsed.

The regulation now to be introduced in a new Section 376 paragraph 3 of the German Fiscal Code is intended to extend the limit of this so-called absolute limitation period to two and a half times (instead of 2 times) the statutory limitation period. The absolute limitation period for prosecution would therefore in future amount to 25 years instead of 20 years.

In addition, by means of the introduction of a new Section 376 paragraph 4 into the German Fiscal Code, it is intended to - in view of the Ministry by means of a clarification - make the suspension of the limitation period for a maximum of five years in accordance with Section 78b (4) of the German Criminal Code applicable to cases of particularly serious tax evasion in accordance with Section 370 (3) sentence 2 point 1 to 6 of the fiscal code, if and were the main proceedings are opened.

The proposed changes are not related to or induced by the COVID-19-Pandemic or its economic consequences. In particular, the reasoning with investigation measures in connection with Cum/Ex constellations is surprising, since the new regulation on the absolute limitation period for prosecution and also the reference to Section 78b (4) of

the Criminal Code would not only concern those constellations, but in principle be applicable to all particularly serious cases of tax evasion. The question arises as to whether such a tightening of tax criminal law is proportionate and serves the Peace of Law.

2. Determination of the relationship of claims arising from tax obligations and confiscation under criminal law

In addition, by means of the introduction of a new Section 375a into the German Fiscal Code, the Ministry/legislator intends to regulate the relationship between claims arising from the tax liability relationship and confiscation under criminal (procedural) law. The lapse of such a claim (including the right to interest) by limitation period pursuant to Section 47 Fiscal Code shall no longer preclude the confiscation of that tax claim or the interest due thereto in accordance with Section 73 of the Criminal Code.

With the onset of the statute of limitations (Section 47 of the Fiscal Code) tax claims expire - unlike civil claims, they do not only become objectionable. According to the case law of the Federal Court of Justice, confiscation is therefore no longer possible in the event of tax evasion if the claims arising from the tax liability relationship are time-barred and have thus expired.

By means of the amendments to the German Fiscal Code, the Ministry/legislator intends to, for the purposes of criminal confiscation, equate claims arising from the tax liability relationship with claims arising from civil obligations. This does not correspond to the systematic classification of inherent to the German Fiscal Code.

Remarks

It remains to be seen whether the changes suggested by the Federal Ministry of Finance, which in our initial assessment are to be viewed quite critically, will actually be adopted in this form and this process, i.e. as part of the legislative process aimed at stimulating the Pandemic-struck economy. In our view, it might be preferable to separate the non-Pandemic-related amendments from changes to provisions of criminal tax law and to deal with them in a separate legislative procedure - if necessary without using the instrument of the Formulation Aid - and after careful consideration and impact assessment.

If you have any questions regarding the legislative proposal, please do not hesitate to contact us and we shall keep you informed about further developments.

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