

Federal Constitutional Court rules interest rate on tax payments unconstitutional

In a decision dated 8 July 2021 and published on 18 August 2021, Germany's Federal Constitutional Court (BVerfG) held that the 6% annual interest rate applied on direct and indirect tax payments and refunds for the year 2014 and subsequent periods violates German constitutional principles.

Background

In accordance with German tax legislation (Sections 233a and 238 of the General Tax Code) interest on tax payments and tax refunds is assessed at a rate of 0.5% per month. Interest generally starts accruing 15 months after the end of the year for which the tax is assessed. The monthly 0.5% rate was introduced into the German tax code in 1961 and has since remained unchanged, despite the low market rates since 2009. The BVerfG has now issued its long awaited ruling on the constitutionality of the annual equivalent 6% interest rate.

In a decision dated 25 April 2018, Germany's Federal Tax Court (BFH) determined that the 6% interest rate on tax payments was no longer realistic and equitable for the period 2015-2017, given the structural and solidified low interest market rates during more recent years (see also GTLN, [18 May 2018](#)). The BFH did not issue a final decision on whether the interest rate was unconstitutional, since this is the responsibility of the BVerfG, but referred the case to the BVerfG for consideration. It is in light of this and several other referred cases that the BVerfG has issued its ruling.

Decision of the BVerfG

The BVerfG now has held that for 2014 and subsequent years, the annual 6% interest rate is evidently unrealistic and, hence, constitutes an unsubstantiated surcharge on tax payments that is no longer aligned with German constitutional principles. However, the BVerfG pointed out that a suspension of the application of the 6% interest rate and the underlying legislation, combined with the obligation of the legislator to amend the provision retroactively, would entail considerable financial concerns and uncertainties. As a result, the court concluded that the 6% rate should remain applicable for interest periods up to and including 2018. The BVerfG granted the German legislator until 31 July 2022 to amend the relevant provisions of the General Tax Code relating to interest applied on (additional) tax payments for 2019 and subsequent years. Amendments potentially also will be required to the provisions determining the interest/discounting rates applied on pension accruals and long-term non-interest bearing liabilities, that also have been the subject of referrals to the BVerfG.

Comment

Taxpayers that already have received interest assessments for interest periods for 2019 and subsequent years that are still open should file an appeal to the extent that the interest assessments have not been made on a preliminary basis.

The amendment of the interest rates on tax payments and tax refunds will be one of the first tax challenges for a new government after Germany's federal elections in September 2021.

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